APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

Case No. 99-831-SNL

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

vs.

AMIEL CUETO,
Defendant/Petitioner.

MEMORANDUM AND ORDER

[Filed: January 25, 2000]

This matter is before the Court on defendant Cueto's petition to vacate his conviction and sentence pursuant to 28 U.S.C. §2255, which provides that a federal prisoner may move the trial court to vacate, set aside, or correct a sentence if 1) the sentence was imposed in violation of the Constitution or the laws of the United States; 2) the trial court was without jurisdiction to impose the sentence; or 3) the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. However, before reaching the substantive issues raised in the defendant's §2255 petition, the Court must first address the companion motion filed by defendant.[1] In connection with the §2255 petition, defendant has filed a motion to disqualify under 28 U.S.C. §455(a) and (b)(1), and §144(#6), filed November 1, 1999. In this motion, defendant contends that this Court cannot give his §2255 petition fair consideration

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[1] The Court will address the merits of the defendant's §2255 petition in a separate order.

because of alleged communications and conduct by the Court in connection with the plea of co-defendant Robert Romanik, and certain comments by the Court at the defendant's sentencing. Cueto asserts that the Court is personally biased against him, therefore this judge must recuse himself under 28 U.S.C. §144 and §455(b). Alternatively, Cueto asserts that this judge's comments and actions during the course of defendant's trial and sentencing would cause an objective observer to question the Court's impartiality towards the defendant, thus, this judge must disqualify himself from any further proceedings involving this matter pursuant to 28 U.S.C. §455(a).

In 1995, Thomas Venezia and his business, B & H Vending were indicted on federal racketeering charges, in addition to other related charges including illegal gambling. Prior to the indictment and throughout the investigation, defendant Cueto served as Venezia's attorney and advisor. It was later determined that defendant Cueto also was Venezia's business partner in several costly business transactions relating to the gambling operations.[2] On December 2, 1995 Venezia and B & H Vending were convicted of racketeering, illegal gambling and conspiracy arising out of the operation of the illegal gambling business.[3]

Several months later, Cueto, Venezia and Robert Romanik, a local public official and investigator who worked for Cueto and Venezia were charged in a nine-count indictment alleging conspiracy to defraud the

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[2] This background material is contained within the Seventh Circuit's opinion affirming the conviction and sentencing of defendant Cueto. *United States v. Cueto,* 151 F.3d 620 (7th Cir. 1998).

[3] This case was tried before a different district court judge.

United States, in violation of 18 U.S.C. §371; and obstruction of justice, in violation of the omnibus clause of 18 U.S.C. §1503, for their conduct throughout the investigation of Venezia and the illegal gambling operation and the indictment and prosecution of the earlier racketeering case.[4] All three defendants were scheduled for a jury trial before this Court.

Ultimately, Venezia pled guilty to the counts in which he was charged; and Romanik pled guilty only to Count 5 of the indictment (the only other count in which he was charged, Count 1 for conspiracy, was dropped). Cueto was tried before a jury and convicted of the charges in Counts 1, 2, 6, and 7 of the indictment; and acquitted of the charges in Counts 3, 4, and 8 of the indictment. Venezia testified at Cueto's trial for the Government pursuant to his plea agreement. Romanik did not so testify. Following his conviction, Cueto was sentenced by this Court to serve a prison term of 87 months, to be followed by two (2) years of supervised release, and a monetary fine.

After sentencing, Cueto appealed his conviction and sentence. Finding no error, the Seventh Circuit affirmed Cueto's conviction and sentence in all respects. *United States v. Cueto, supra.* Cueto then filed a petition for *a writ of certiorari* with the United States Supreme Court, which the Court denied. *Cueto v. U.S.*, ___ U.S. ___, 119 S.Ct. 1249 (March 22, 1999). Cueto then filed this §2255 petition, along with the motion to disqualify and/or recuse pursuant to 28 U.S.C. §144, §455(a) and (b)(1).

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[4] *See, United States v. Cueto*, at 625-30 for a thorough review of the actions taken by Cueto and his co-defendants giving rise to the indictment for violations of §371 and §1503.

28 U.S.C. §144

Cueto moves for recusal under 28 U.S.C. §144. Section 144 states in pertinent part:

> Whenever a party to any proceeding in district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Thus, pursuant to §144, in addition to a showing of judicial bias, a movant must file a timely motion, an affidavit stating the facts and reasons for the movant's belief that judicial bias exists, and a certificate by the movant's counsel of record stating that the motion is made in good faith. 28 U.S.C. §144; *U.S. v. Sykes*, 7 F.3d. 1331, 1339 (7th Cir. 1993); *U.S. v. Balistrieri*, 779 F.2d 1191, 1199-1200 (7th Cir. 1985). Since §144 is "heavily weighted in favor of recusal, its requirements are to be strictly construed to prevent abuse." *Sykes*, at 1339. Furthermore, under §144, recusal is mandatory once the movant has filed a timely and sufficient affidavit and counsel presents a certificate of good faith; however, the challenged district court judge makes the determination as to the timeliness and sufficiency of the affidavit, rather than automatically recusing upon the filing of same. *Balistrieri,* at 1200; *Berger v. United States*, *255* US. 22, 36 (1921).

For a recusal motion to be timely, it "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shown for failure to file at such time." 28 U.S.C. §144. Since district courts generally no longer sit by "terms", the

Seventh Circuit has held that a §144 motion shall be filed "at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for such disqualification." *Sykes,* at 1339 *citing U.S. v. Barnes,* 909 F.2d 1059, 1071 (7th Cir. 1990) (*quoting U.S. v. Patrick,* 542 F.2d. 381, 390 (7th Cir. 1976)). Thus, for Cueto's motion to be timely, it must have been filed as soon as Cueto became aware of the Court's alleged bias.

Cueto grounds his motion, as to §144, on two broad contentions: Firstly, that this judge improperly participated in Romanik's plea negotiations which culminated in a plea agreement that kept Romanik from testifying at Cueto's trial; and secondly, that this judge learned "unsavory" things about Cueto during these same plea negotiations and from unredacted newspaper articles[5]. Cueto asserts that these factors contributed to a personal bias on the part of this judge which is evidenced by the excessive sentence handed down. These grounds existed well before the time of trial, and certainly prior to sentencing, thus, Cueto did not present these allegations "at the earliest moment" that he became aware of the facts upon which they are based. The motion for recusal under §144 is untimely.

The allegation concerning the Court's alleged improper involvement in Romanik's plea negotiations is untimely. Romanik pled guilty to Count 5 of the indict-

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[5] The newspaper articles referred to are in connection with a newspaper owned and published by defendant Cueto called the East Side Review. In the East Side Review, Cueto personally authored several articles in which he complained of prosecutorial misconduct in association with the racketeering case and maligned the integrity and reputations of several Assistant United States Attorneys involved in the investigation and prosecution of the racketeering case.

ment in open court on March 3, 1997. The plea was taken at approximately 5:00 p.m. which is standard operating procedure for this Court; i.e. to take up criminal matters such as pleas and sentencings over the "lunch hour" or after 5:00 p.m. It is not required that the Court "publish" notice of a plea nor is it required that co-defendants attend the plea. Cueto did not go to trial until April 1997. He was well aware of the plea before trial. Romanik pled to a charge not faced by Cueto.[6] When taking Romanik's plea, the Court engaged in the normal course of conversation with counsel and the defendant which precedes the taking of the plea. Due to certain concerns raised by all counsel and defendant Romanik, an affidavit which served to supplement the Court's finding of a factual basis for the plea was filed under seal. If Cueto believed that Romanik's plea provided prejudicial information to this judge, he could have raised his allegations earlier.[7]

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[6] Count 5 of the indictment charged Romanik with lying to the grand jury. In response to approximately 150 questions, Romanik answered that he had "no recollection" or "didn't know" when in fact he did possess the knowledge and facts to answer the questions and chose not to do so with the intent to deceive the grand jury.

[7] Cueto attempts to argue the timeliness of the affidavit by vaguely asserting that the personal bias of this judge was not apparent until certain comments were made at the sentencing of Robert Romanik on January 25, 1999 for violating the terms of his probation. The comments cited by Cueto clearly reflect only this Court's customary and standard discussion with counsel and Romanik when deciding to accept a plea and this Court's frustration with Romanik for violating the terms of his probation after much effort in forging the plea agreement had been undertaken by all counsel. Using the event of Romanik's sentencing for violating his probation to create the facade of timeliness is meritless.

As to the alleged bias gained from reading unredacted East Side Review articles, this contention also is untimely. These newspaper articles were a constant source of numerous pretrial motions, largely filed by Cueto's own counsel. Furthermore, the trial record clearly shows that defense counsel persistently tried to put into evidence these unredacted articles and entire copies of the East Side Review. If Cueto believed that the Court was biased because of its perusal of these unredacted articles and newspapers, he could have raised his allegations prior to trial, and certainly prior to sentencing.

Assuming arguendo that the motion and accompanying affidavit were timely filed, the Court is still required to determine the legal sufficiency of the affidavit. An affidavit is sufficient if it avers facts that, if true, would convince a reasonable person that bias exists. *Sykes,* at 1339; *Balistrieri,* at 1999; *United States v. Baskes*, 687 F.2d. 165, 170 (7th Cir. 1981). Thus, this Court is required to accept as true the facts asserted even if it "knows them to be false." *Sykes*, at 1339; *Balistrieri*, at 1199. However, the facts averred must be pled with particularity and must be definite as to times, places, persons, and circumstances. *Barnes*, at 1072; *Balistrieri*, at 1199. The district court is not obliged to accept conclusions, opinions, and/or rumors. *Sykes*, at 1339; *Barnes,* at 1072; *Balistrieri*, at 1199. Finally, the affidavit must show "that the bias is personal rather than judicial, and that it stems from an extrajudicial source — some source other than what the judge has learned through participation in the case." *Sykes,* at 1339 *quoting Balistrieri,* at 1199.

After careful consideration of the affidavit, the Court finds it to be legally insufficient to convince a reasonable person that bias exists. Firstly, the affidavit largely

depends on "facts" not stated within the affidavit, but instead are referenced as "Point 3" in defendant's §2255 petition. Consequently, the affidavit is significantly devoid of any facts which are "sufficiently definite and particular". *See, Balistrieri,* at 1199. Secondly, those facts which are averred do not indicate any actual prejudice or bias by this Court against defendant Cueto.

Cueto avers that this Court's comments at his sentencing "that I had abused the First Amendment, and had treated the First Amendment with license, for which I must be punished" reflects this Court's personal bias. Furthermore, that this bias stems from an extra-judicial source, namely his newspaper, the East Side Review. Defendant Cueto's selective recitation of this judge's comments at sentencing is misleading. The Court's entire comment reads as follows:

> "Mr. Cueto, if you and counsel will come forward please.
>
> I really feel that one of the jewels of our system is the First Amendment.
>
> And the First Amendment gives all of us unprecedented rights that other people in the world do not have.
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> It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.
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> And for that you should be punished.

Transcript of Sentencing of Defendant Amiel Cueto, September 19, 1997; filed October 2, 1997; pg. 65.

As the transcript shows, this Court did express its opinion that defendant had abused his First Amendment rights; however, more importantly, he had abused the judicial system which was the basis for the indictment upon which he had been convicted. Count I of the indictment charged Cueto in a three-part conspiracy to defraud the United States, in violation of 18 U.S.C. §371, alleging that he misused his position as an attorney to unlawfully and intentionally conspire with Venezia and Romanik to impede, impair, obstruct, and defeat the lawful function of the FBI, the grand jury, and the federal district court in connection with the investigation, indictment, and prosecution of Venezia, B & H Vending, and the illegal gambling operation and racketeering enterprise. *U.S. v. Cueto*, 151 F.3d. at 628. Counts 2, 6, and 7 of the indictment charged Cueto with obstruction of justice in violation of the omnibus clause of 18 U.S.C. §1503 alleging that Cueto had corruptly used his office as an attorney to influence, obstruct, and impair the due administration of justice in various court proceedings in connection with the investigation, indictment, and prosecution of the racketeering case. *U.S. v. Cueto*, 151 F.3d. at 628-29. Thus, an objective, disinterested observer would conclude that even if this Court were bothered by Cueto's claim of First Amendment protection, he had nevertheless been indicted and successfully prosecuted for abusing the judicial system "[a]nd for that you should be punished". The Court's comments do not demonstrate any actual prejudice or bias.

The affidavit cites to Cueto's newspaper as presumably the "extrajudicial source" from which the alleged bias stems. Assuming for the moment that this Court had formed a personal bias against Cueto, the fact still remains that this bias, even if it came from reading

Cueto's newspaper, did not stem from an extrajudicial source. Cueto mistakenly asserts that since entire articles and/or copies of his publication were not entered into evidence, then they must be "extrajudicial". He cites no caselaw which support his premise that extrajudicial includes evidence not officially on the record. Contrary to this assertion, the Seventh Circuit has defined "extrajudicial source" as "some source other than what the judge has learned through participation in the case." *Sykes*, at 1339; *Balistrieri*, at 1199. It is undisputed that unredacted articles from the East Side Review, as well as entire unredacted copies of the East Side Review, were the source of several pretrial and trial evidentiary motions. This Court was constantly required to rule on issues involving these articles; mostly proffered by defense counsel. The prejudice alleged stems from a source that was regularly reviewed by this Court throughout the prosecution of Cueto.

A reading of the entire sentencing transcript indicates that the brief remarks made by this judge upon which defendant relies in arguing for recusal are factual statements regarding the charges upon which plaintiff was convicted and the Court's admonishment that he be punished for "abusing the judicial system". These remarks neither relied upon knowledge acquired outside defendant's pretrial and trial proceedings, nor displayed deep-seated and extreme bias or prejudice that would render fair judgment on defendant's pending §2255 petition impossible.

Although it is unclear in the affidavit, it appears that defendant is also asserting that statements made by this Court upon sentencing co-defendant Romanik for violating the terms of his probation are reflective of alleged improper participation and involvement by the

Court in Romanik's plea negotiations. No facts are asserted; simply statements of conclusions and insinuations. Cueto asserts "[s]pecifically, I believe that Judge Limbaugh has personal knowledge as to what he meant when he described the 'considerable discussion' regarding the Romanik plea bargaining which he 'finally determined' to accept and which he felt compelled not to deviate from as his 'part of the bargain'; those comments having been made by Judge Limbaugh at the sentencing of Robert Romanik on January 25, 1999." Firstly, the source of these comments is clearly the plea of a co-defendant; thus, Cueto has failed to demonstrate bias of an extrajudicial origin. Whatever this judge learned from discussions with counsel concerning Romanik's plea was information obtained through participation in the case. Furthermore, what must stem from an extrajudicial source are facts and information. *Alexander v. Chicago Park District*, 773 F.2d. 850, 856 (7th Cir. 1985). Cueto makes no factual averments as to exactly what it is this judge learned through the alleged discussions and communications in connection with Romanik's plea that would give rise to actual bias or prejudice on this judge's part. "[T]he mere fact that a judge has participated in plea discussions, without more, does not provide a reasonable basis for questioning a judge's impartiality." *United States v. Cepeda Penes*, 577 F.2d. 754, 758 (1st Cir. 1978). While the Court must accept all the facts averred as true; i.e. that comments were made on January 25, 1999 while sentencing Romanik for violating the terms of his probation which referred to lengthy discussions involving counsel as to the plea bargain terms and conditions, that the Court was "compelled" to accept the plea, and that despite whatever other reservations this Court might have concerning Romanik, the Court would not deviate from the terms of

the plea agreement as to sentencing, the Court is not obligated to accept Cueto's inferences or conclusions that he wishes to draw from these facts.

"The negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind a fair-minded person could not entirely set aside when judging certain persons or causes." *Balistrieri*, at 1201. "The disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence." *Id.* at 1202. Even when accepting as true all of Cueto's factual allegations and setting aside this Court's own personal knowledge and credibility determinations, no evidence exists of actual personal bias stemming from an extrajudicial source so strong as to impede this Court's impartiality of judgment. "The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *United States v. Bernstein*, 533 F.2d. 775, 785 (2nd Cir. 1976); *see also, United States v. Patrick*, 542 F.2d. 381, 390, n.10 (7th Cir. 1976*) (citing Bernstein, supra.).* Defendant Cueto's affidavit fails to demonstrate facts upon which a reasonable person could find that the Court holds some personal animus or malice towards him which would interfere in further adjudication of his case. Therefore, his affidavit does not meet the sufficiency requirement as set forth under 28 U.S.C. §144.

28 U.S.C. §455

Section 455 is the comprehensive federal recusal statute.[8] Section 455(a) requires a judge to disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned. Section 455(b)(1) requires disqualification when the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts.

Section 455(b)(1) duplicates the grounds of recusal set forth in §144 with the phrase personal bias or prejudice" but contrary to §144, §455)(b)(1) contemplates that the sitting judge make the substantive decision as to the merits of the disqualification motion. *Liteky v. United States*, 510 U.S. 540, 548 (1994); *Balistrieri*, at 1202-03. The courts have applied the same meaning to the phrase "personal bias or prejudice" in both statutes; however, the strict procedural requirements of §144 do not apply to §455(b)(1). *Balistrieri*, at 1202. Under §455(b)(1), a court need not take the factual averments of the affidavit as true and can make credibility determinations and contradict the evidence with facts drawn from its own personal knowledge and experience. *Balistrieri*, at 1202. However, the origin of the judge's personal bias or prejudice still remains an extrajudicial source. *U.S. v. Liteky*, 510 U.S. at 551. Finally, the appropriate standard of proof is the same for both §144 and §455(b)(1): "whether a reasonable person would be convinced that the judge is biased." *Balistrieri*, at 1202-03.

Since the affidavit was insufficient to compel recusal under §144, when all factual averments were assumed true, then it cannot possibly be sufficient to compel

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[8] Actually the statute speaks in terms of "disqualification" and not recusal.

disqualification under §455(b)(1). *See, Balistrieri, supra.* Defendant Cueto, though, submits more than just his affidavit in support of his §455(b)(1) portion of his motion. He submits copies of pleadings he has filed previously in this case and of a newspaper article published in the Belleville News-Democrat newspaper. These are filed apparently in support of his contention that this judge formed a personal bias against him through information obtained during Romanik's plea negotiations, and that this "knowledge" somehow extends to evidentiary facts in dispute as hypothesized in Cueto's §2255 petition.

The Court feels compelled to address the defendant's misstatements and improper inferences which he relies upon to demonstrate actual prejudice or bias; or personal knowledge of disputed evidentiary facts. Defendant Cueto's primary argument for disqualification is that this Court holds a personal bias or has personal knowledge of disputed evidentiary facts which precludes an objective consideration of his pending §2255 petition. His "source" for this bias or personal knowledge is the sealed affidavit filed by Romanik at his plea. He backs up his assertions with copies of editorials and newspaper clippings from the Belleville-News-Democrat. Firstly, the Court allowed the filing of the affidavit under seal because it was requested by both counsel for defendant and the Government. The affidavit provided the factual basis for the Court's determination to accept the plea. The Court is bound to make a finding that facts exist which support the defendant's decision to plead guilty to the crime(s) as charged in an indictment. Whatever is in the affidavit is between defendant Romanik, his counsel, and the Government. This Court's only interest in the affidavit is whether it factually supports the charge for which defendant Romanik pled

to; not whether it reveals secret information about other people, including defendant Cueto. Secondly, this Court's involvement with the plea negotiations did not extend to the drafting of the sealed affidavit. This Court's communication with counsel for Romanik and the Government consisted primarily of consideration of potential range of sentencing depending upon the nature of the plea agreement. Whether Romanik testified or not at defendant Cueto's trial was a factor considered by counsel and defendant Romanik, not by this Court. Using newspaper articles and editorials as support for recusal is ludicrous. The "power of the press" does not extend into this courtroom. The press' vivid imagination and misinterpretation of statements cannot legally suffice to establish a factual basis for doubting this Court's impartiality. *See, U.S. v. Cepeda Penes*, at 758; *Tucker v. Kerner*, 186 F.2d. 79, 84 (7th Cir. 1950). All comments cited to by Cueto were, by his own admission, made in connection to Romanik's plea. "Opinions formed by a judge based on facts introduced or events occurring during legal proceedings ordinarily do not support recusal." *Hall v. Doering*, 185 F.R.D. 639, 642 (D.Kansas 1999) *citing Liteky*, 510 U.S. at 555-56. Furthermore, "[r]emarks made in the course of ordinary courtroom administration do not require recusal." *United States v. Kimball*, 73 F.3d. 269, 273 (10th Cir. 1995) *citing Liteky*, 510 U.S. at 555. Finally, forgetting for the moment that Cueto fails to identify the "disputed evidentiary facts", knowledge of such facts requires disqualification only if the knowledge has an extrajudicial source. *United States v. Widgery*, 778 F.2d. 325, 328 (7th Cir. 1985). The knowledge of the facts here, presumably in the Romanik's sealed affidavit, comes exclusively from a judicial proceeding in connection with the criminal case involving not only defendant Cueto, but also defendants Romanik and Venezia.

This Court has searched not only the court files and transcripts, but also its conscience to determine if some bias against defendant Cueto was so consuming that it prejudicially affected the Court's rulings. The answer is no. The Court did everything in its power to protect the sanctity of the courtroom and the integrity of the judicial process. Defendant Cueto fails to mention that although he believes he is entitled to a copy of Romanik's sealed affidavit, he vehemently opposed Romanik's request for a copy of Cueto's pre-sentence investigation report. This Court denied that request because defendant Cueto is entitled to the protection of the confidentiality of the report. After much deliberation and consideration of the matter, this Court not only denied defendant Cueto's request for a downward departure at sentencing, but also denied the Government's request for an upward departure at sentencing. Defendant Cueto may feel his sentence was excessive, but it is within the applicable range under the sentencing guidelines, and has been upheld by the appellate court.

As a final recourse, defendant turns to §455(a) as an avenue for disqualification. Pursuant to §455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As with §455(b)(1), the Supreme Court has found that the "extrajudicial source" doctrine is equally applicable to §455(a). *Liteky*, *supra*. Section 455(a) does not require disqualification solely because a judge has opinions about the persons appearing before him or her. It would be impossible for any human being not to develop opinions about other people based upon what a person personally sees and hears. This is no different for a judge's observations from the bench. Section 455(a) "is not intended to protect litigants from actual bias in their

judge but rather to promote public confidence in the impartiality of the judicial process." *Balistrieri*, at 1204 (citation omitted). The focus of §455(a) is not on whether the judge has an opinion, but rather on whether a reasonable doubt exists regarding the judge's ability to rule impartially in the case. District Court Judge James B. Zagel best summarized this "standard of proof" when he stated:

> "A judge's impartiality, therefore, cannot reasonably be questioned based on any expression of opinion derived from what he has learned during the proceedings — all judges have such opinions, and all strive to (and generally do) rule impartially despite them. Instead, what counts is whether the particular expression of opinion — taken in context — was such that a reasonable observer could have significant doubt of the judge's ability to rule impartially despite the opinion — in other words, whether, in the particular case, the judge's opinion is so consuming that it will prevent the judge from doing the job that judges do every day."

United States v. Feliciano, - , 993 WL 524338 (N.D.Ill. 1993) (unpublished opinion).

As stated several times previously, defendant Cueto has alleged no facts indicating an extrajudicial source of bias. Furthermore, the Court's comments and actions were fully supported by the evidence presented during all proceedings in the matter of the criminal prosecution of defendant Cueto and his co-defendants Romanik and Venezia.

As the Cueto sentencing transcript shows, the comments of the Court regarding Cueto's "abuse of the First Amendment", "treat[ing] it with license", and "for that

you should be punished" have been twisted, taken out of context, and misrepresented in order to create an appearance of impartiality. In actuality, although this Court did not believe that defendant Cueto was entitled to the protection of the First Amendment[9], it was his abuse of the judicial system — the crux of the charges upon which he was convicted, for which he had to be punished.[10]

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[9] This opinion was later affirmed by the Seventh Circuit.

> "Speech which is false and misleading is not protected by the First Amendment's right to freedom of speech. Just as false statements are not immunized by the First Amendment, meritless litigation based on false accusations and criminal intentions does not fall within the scope of protected speech and 'is not immunized by the First Amendment right to petition.' Cueto fails to show that his conduct is entitled to First Amendment protection; Cueto's conduct is not the kind of conduct with even a colorable claim to First Amendment protection and his argument must fail."

United States v. Cueto, 151 F.3d. at 634, n. 11.

[10] It is this Court's considered opinion that the comments made at defendant Cueto's sentencing not only fail to reflect a bias based on extrajudicial origin but fail to even come close to the egregious remarks made by other judges yet found not to be deemed cause for disqualification. *United States v. Kimball*, 73 F.3d. 269 (10th Cir. 1995) (trial judge's comment at sentencing that defendant should "die in prison" found to be an "unfortunate comment" but not requiring recusal); *United States v. Bernstein, et al.*, 533 F.2d. 775 (2nd Cir. 1976) (remarks made by trial judge at time of taking pleas and in the course of sentencing co-defendants that the charged conspiracy was "this terrible scheme" and "a great big scheme" and "I am sure this conspiracy has cost society millions of dollars by way of payment of taxes and otherwise. . ." found not to exhibit bias or partiality as asserted by the remaining defendants in their recusal motion); *Tucker v Kerner*, 186 F.2d. 79 (7th Cir. 1950 (remarks made by a judge, while presiding over a bankruptcy proceeding which involved an accusation against the plaintiff of

(Footnote 10 continued on next page)

Furthermore, the Court's comments at Cueto's sentencing do not give any indication that they are derived from any extrajudicial source. Assuming that such comments regarding the abuse of the First Amendment were based upon the Court's perusal of Cueto's newspaper, the East Side Review, again, the unredacted articles and copies of said paper were placed before the Court for examination many times during the course of the criminal proceedings for evidentiary rulings. The fact that as unredacted articles and papers they were not accepted as part of the evidentiary record at trial and seen by the jury is immaterial. They still were placed before the Court in the course of judicial proceedings, and as such, cannot support a basis for disqualification.

The comments of the Court at Romanik's sentencing for violating the terms of his probation again have been

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Footnote 10 continued)

defrauding his company, that "... the difficulty in this whole case is that the persons who have been defrauded are the poorest and smallest people in America, five or ten dollar people, those are the people we have to protect around here."... fail to display a personal bias or prejudice requiring recusal); *United States of America v. Antonelli*, 582 F.Supp. 880 (N.D.Ill. 1984 (judge's remarks at a bond revocation hearing and second sentencing of defendant that referred to the defendant as "[t]he most viciously antisocial person who has ever come before me" and that "society has been too lenient with you up to this point" held as insufficient to show personal bias and prejudice pursuant to 28 U.S.C. §§144 and 455(a)); *see also, United States v. Feliciano, supra* (trial judge's pretrial comments describing defendant as a "menace to navigation" and additional comments that the defendant would probably be found guilty and that defendant's prior guilty pleas would be valid convictions which the Government could use at trial, found not to be remarks evidencing a personal bias or prejudice requiring disqualification under §455).

twisted and taken out of context. Such comments regarding his earlier plea were nothing more than an expression of frustration, perhaps even anger, over defendant Romanik's apparent disregard for the effort and time expended in fashioning a generous plea arrangement that the Court was not personally pleased with but which met all the legal requirements of an acceptable plea agreement. "Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Liteky*, 310 U.S. at 555-56.

Having carefully reviewed defendant Cueto's grounds for disqualification under §455(a), this Court finds that no reasonable person, knowing all of the relevant facts, would find a clear indication that such a strong and deep-seated bias or antagonism exists towards defendant Cueto which would prevent this Court from ruling impartially in all matters coming before it in this case. Grounds for disqualification under §455(a) simply do not exist.

Accordingly,

IT IS HEREBY ORDERED that defendant Cueto's motion to disqualify under 28 U.S.C. §144 and §455(a) and (b)(1) be and is DENIED.

Dated this 24th day of January, 2000.

/s/ Stephen N. Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago. Illinois 60604

April 25, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

IN RE:
AMIEL CUETO,
Petitioner.

No. 00-1600

Appeal from the United States District Court for the
Southern District of Illinois,
East St. Louis Division.

No. 98 C 831

Stephen N. Limbaugh,
Judge.

The following is before the court:

1. **PETITION FOR WRIT OF MANDAMUS,** filed March 9, 2000, by counsel for the petitioner.

2. **APPENDIX TO PETITION FOR WRIT OF MANDAMUS** , filed March 9, 2000, by counsel for the petitioner.

3. **RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF MANDAMUS** , filed March 24, 2000, by counsel for the respondent.

4. **REPLY TO GOVERNMENT'S RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF MANDAMUS** , filed April 3, 2000, by counsel for the petitioner.

IT IS ORDERED that #1 is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 3:96 CR 30070

East St. Louis, IL
September 19, 1997

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AMIEL CUETO,
Defendant.

TRANSCRIPT OF SENTENCING

BEFORE THE
HONORABLE STEPHEN N. LIMBAUGH

APPEARANCES:

For the Government:

MS. MIRIAM F. MIQUELON
MR. NORMAN SMITH
Asst. U.S. Attorneys
9 Executive Drive
Fairview Heights, IL

For the Defendant:

MR. RONALD E. JENKINS
10 South Brentwood
Clayton, MO 63105
MR. JAMES DONOVAN
MR. CHRIS CUETO
7110 West Main Street
Belleville, IL 62223

Defendant appeared in person

Reported by: Ann J. Taylor
Official Court Reporter
1114 Market Street
St. Louis, MO 63101
(314) 621-3650

* * *

[65]

boss in a protection racket, and a racketeering enterprise.

We ask that justice be swift and firm, and we ask that the defendant be sentenced at the upper end of the guidelines, your Honor.

THE COURT: Any final comments, Mr. Jenkins?

MR. JENKINS: No, sir.

THE COURT: All right.

Mr. Cueto, if you and counsel will come forward please.

I really feel that one of the jewels of our system is the First Amendment.

And the First Amendment gives all of us unprecedented rights that other people in the world do not have.

It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.

And for that you should be punished.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Amiel Cueto, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of

* * *

APPENDIX D

RACKETEERING IN THE METRO-EAST

Extortion Pays Good - If You're In The Gangster Disciples, The FBI, Or The U.S. Attorney's Office

The Racketeer Influenced and Corrupt Organizations Act in Chapter 18 of the United States Code, Section 1961, was passed by Congress 25 years ago. This is the so-called RICO Act, and it was Congress' answer to organized crime and criminal organizations. The RICO Act says that you're guilty if you commit two "predicate offenses" in the furtherance of some criminal enterprise. The "predicate offenses" are certain kinds of crime, defined in the Act; they include murder, extortion, kidnapping and other "racketeering" type of offenses.

NO MORE MAFIA

Although RICO was designed especially for the Mafia, the Mafia has gone the way of the Soviet Union. Our local federal prosecutors in the 1990's love to use RICO on petty offenses like tavern owners who pay bets on video poker machines. That way they can elevate misdemeanors into RICO crimes, which carry long prison sentences. You might wonder what kind of sickos would want to put poker-machine operators into prison for ten years or more when the average murderer serves less time than that. The answer lies in three parts: 1) The U.S. Attorney's Office is nominally run by Flounder (W. Chuck Grace), a buffoon who's only good for issuing press releases. The office is really controlled by Herr Grupenfuhrer (Michael Carr), who came goose-stepping in the Metro-East about thirteen years ago, and who would have been right at home as commandant of

the Auschwitz death camp. Locking up tavern-owners and vending operators for life — simply because they've trafficked in video poker machines — is just the kind of sadistic fun that the Grupenfuhrer lives for. 2) When Rick Hess became U.S. Attorney in 1992, he had four assistants, now the office has twenty-nine. With twenty-nine assistant U.S. attorneys falling all over each other, they've got to find something to do to justify their existence and their fat paychecks. They all make salaries of more than $60,000/year; in fact many make upwards of $100,000, far more than they could make in the private practice of law. But there just isn't that much real federal crime. However Herr Grupenfuhrer has found a simple solution — the federal prosecutor's office invents crime. Petty state misdemeanors are converted into RICO and "Money Laundering". That way, Herr Grupenfuhrer gets his jollies, and it gives twenty-nine assistant U.S. attorneys something to do. 3) The local FBI and federal prosecutors don't have the stomach to use RICO where it would really do some good — against E. St. Louis street gangs like the Gangster-Disciples. That would require some real street police work, some real prosecutorial diligence. It would also take some guts, and it wouldn't be any fun for Herr Grupenfuhrer. Locking up innocent people is a lot more satisfying to him.

GANGSTER DISCIPLES AND VICE LORDS

The two main street gangs in our area are the Gangster Disciples and the Vice Lords. These gangs are virulently racist, one of their initiation rites is the murder of a white man or the rape of a white woman. But they're also equal-opportunity extortionists. The first edition of *East Side Review* chronicled the extortion against elderly blacks in Belleville by the horde of street-gang thugs. Each edition of *East Side Review* has

reported the details of murder, rape, armed robbery and mob violence by the horde. If the U.S. Attorney's Office had a shred of integrity, if they had just a little intestinal fortitude, they'd use the resources of the federal police apparatus to pursue these gangs. But don't count on it any time soon, because not only are these federal goons corrupt from the top and gutless to the core, there is another reason why the U.S. Attorney's Office doesn't want to use the RICO Act against real crime.

THE U.S. ATTORNEY-FBI RACKETEERING ENTERPRISE

The U.S. Attorney's Office in the Southern District of Illinois is itself a criminal organization. In *U.S. v. Canino*, 949 F.2d 928 (7th Cir. 1992), the federal court of appeals in Chicago reported the shocking truth about racketeering in our local U.S. Attorney's Office. The court of appeals reported that Herr Grupenfuhrer Michael Carr had committed two "predicate offenses". Grupenfuhrer Carr threatened an adversary twice: first threatening to break his nose, then threatening to "get him". Each threat was a violation of 720 ILCS 5/12-6, INTIMIDATION, each was a "predicate offense" under RICO. Now, it must he emphasized that the RICO crime by Carr was reported by the United States Court of Appeals in 1992. But as yet, no one in the Justice Department has done a thing about the Grupenfuhrer's heinous crime. To the contrary, when Flounder (W. Chuck Grace) was made U.S. Attorney, he elevated the Grupenfuhrer to First Assistant. You may ask why a RICO offense would be ignored by the very people who are supposed to prosecute RICO offenses. The answer is that the federal police apparatus in our area is permeated with corruption.

FRICK AND FRACK: EXPERTS AT EXTORTION

FBI Agent Donald Taylor lives in an expensive house in the ritziest part of St. Louis County. He doesn't choose to live among the people of the Metro East. Taylor and Herr Grupenfuhrer don't think of us as citizens, we are their subjects. Citizens have rights but subjects are supposed to do as they're told. You might wonder how a simple FBI agent like Taylor could afford to live among the high born and well-to-do. The evidence is that he supplements his government salary with a share of the proceeds from a lucrative extortion racket.

In the first edition of *East Side Review,* published December 19, 1994, we outlined in great detail the shakedown racket being run by Donald Taylor and Bonds Robinson, Jr. (aka Frick and Frack.) *East Side Review* quoted extensively from transcripts of sworn testimony which proved that Robinson's pay-off demand from local businesses was $250/week. How much of this was Taylor's cut? How many businesses were being shaken down every week? How high up in the federal police apparatus did the corruption go? Was Herr Grupenfuhrer Carr in for a cut of the take? These questions and many others were on the verge of being answered last summer. State's Attorney Bob Haida had called local businessman Anthony Joynt to the St. Clair County grand jury. Haida was about to indict Bonds Robinson on thirteen counts of perjury and thirteen counts of official misconduct, crimes punishable by 130 years in prison. But then Haida was stopped cold in his tracks.

MISS PIGGY AND FRICK ON THE ATTACK

Assistant U.S. Attorney Miriam Miquelon (aka Miss Piggy) was imported by Herr Grupenfuhrer because of

her complete lack of integrity and slavish devotion to the Nazi principles of Herr Grupenfuhrer Carr. Miss Piggy (Miquelon) teamed up with the FBI extortionist Taylor and they paid Bob Haida a visit. Although they talked in hypothetical terms, their message was clear: If Haida continued to pursue Robinson, Herr Grupenfuhrer and the Hitler Youth would pursue Haida. Miss Piggy (Miquelon) and Frick (Taylor) mentioned federal "obstruction of justice". The threat by Miss Piggy and Frick to Haida was subtle but chilling. Unscrupulous Nazis like Miss Piggy and Herr Grupenfuhrer and Frick are perfectly willing to manufacture evidence and invent crimes, especially when they're on a mission like protecting the Bonds Robinson protection racket. Haida stopped his investigation dead in its tracks.

THE SOLUTION TO THE PROBLEM

There are two possible ways that the iron boot of federal law enforcement corruption can be lifted from the throats of people in St. Clair County. One is that the Justice Department from Washington could come in and RICO the racketeers. But don't count on that anytime soon. The federal appeals court in Chicago reported the heinous crimes of Herr Grupenfuhrer Carr three years ago, and our stalwarts in the Justice Department have ignored the report. The second solution is more likely. That is that State's Attorney Bob Haida will be replaced by somebody who is not intimidated by Nazis, even ones who have Justice Department badges. A new State's Attorney who would relish investigating federal law enforcement corruption is what we need. Stay tuned, it may happen sooner than you think. In the meantime, *East Side Review* will keep printing the truth.

News, Analysis and Opinion From A Different Perspective

East Side Review

Volume V
March 6, 1995

An Independent, Freedom Newspaper
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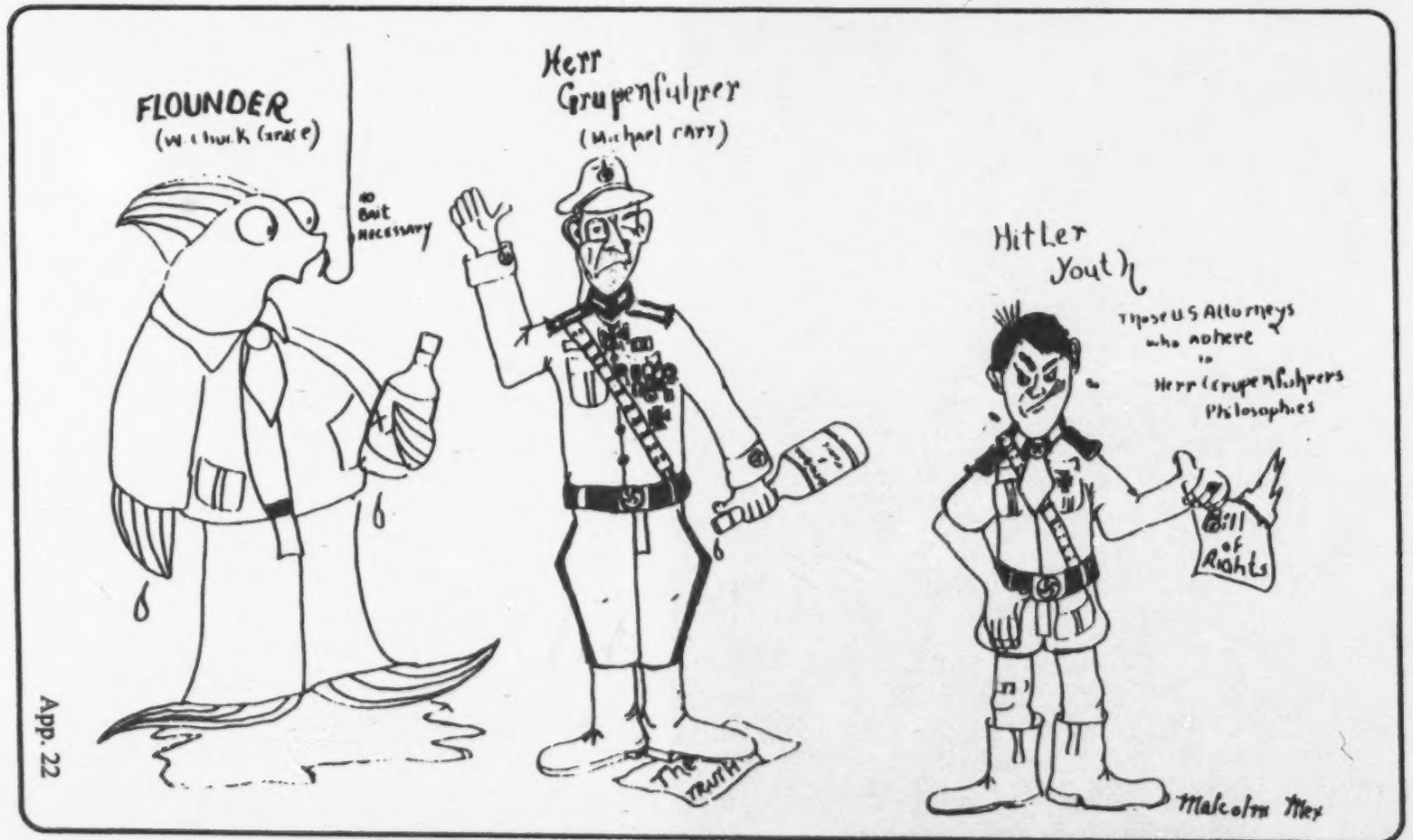

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APPENDIX E

LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO MAY BE PROSECUTED BY STATE AUTHORITIES

Here in St. Clair County we have a home-grown group of Justice Department Nazis. (See "Glossary of Terms" on page 7). Two of these — Hitler Youth member Miriam Miquelon of the U.S. Attorney's Office and FBI-Nazi Donald Taylor — threatened State's Attorney Robert Haida last summer. As *East Side Review* has extensively reported, Haida had a lead-pipe cinch perjury case against FBI surrogate, Bonds Robinson, Jr. The two federal Nazis — Miquelon and Taylor — threatened to frame Haida on a phony "Obstruction of Justice" charge in order to prevent the indictment of Robinson. The threat has worked, so far.

But Miquelon and Taylor have violated the criminal laws (Intimidation: 720 ILCS 12-6, which is a Class 3 Felony) of the State of Illinois. Just because these two particular Nazis have Justice Department badges, doesn't make them immune from prosecution for their state-law crimes.

The state prosecutors in Idaho may have the courage to prosecute the federal Nazis who murdered Vicki and Sam Weaver. The citizens of our community will be wondering whether our local Nazis will be brought to justice as well. Maybe Haida himself doesn't have the courage to prosecute them, but that doesn't mean these Nazis will escape prosecution. Haida's soon-to-be successor is known to dislike Nazis — in fact he doesn't like them at all. We might be in for an interesting two years. Stay tuned to *East Side Review* for complete updates on this continuing story.

January 30, 1995

GOVERNMENT EXHIBIT 28-2A 96-30070

MENT

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APPENDIXF

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CRIMINAL NO. 96-30070-SNL
CIVIL HABEAS CORPUS NO.:

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMIEL CUETO,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF UNDER 28 USC 2255

NOW COMES the defendant, Amiel Cueto, through his attorney, Bruce Cook, and for his Memorandum in Support of Defendant's Motion for Relief under 28 U.S.C. §2255, states as follows:

PROCEDURAL HISTORY

On July 18, 1996, the defendant was charged in 7 counts of an Indictment that was filed in the United States District Court for the Southern District of Illinois. On June 11, 1997, a jury returned not guilty verdicts on Counts 3, 4 and 8, guilty verdicts on three counts of obstruction of justice (Counts 2, 6 and 7), and a guilty verdict on one count of conspiracy to defraud the United States (Count 1).

On September 19, 1997, the Honorable Stephen Limbaugh sentenced the defendant to: 60 months on Count 1 (the maximum allowed under 18 USC 371), 87 months on each of Counts 2, 6 and 7, all sentences to run concurrently. (Exhibit 1.)

Defendant surrendered to the federal prison at Springfield, Missouri on October 1, 1997. On July 31, 1998, the Seventh Circuit Court of Appeals affirmed his conviction and sentence. See *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998). On March 22, 1999, the Supreme Court denied his Petition for Writ of Certiorari. *U.S. v. Cueto*, 119 S.Ct. 1249, 143 L.Ed.2d 347(1999). Defendant is currently incarcerated at the Federal Prison Camp in Yankton, South Dakota.

Under 28 USC 2255, a prisoner in federal custody who is actually innocent, or who has suffered "a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack", is entitled to have the judgment vacated and set aside; the court then "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

Petitioner challenges the validity of his convictions and sentence on several grounds. First, and foremost, he raises the government's suppression of evidence that would have favored the defense in a material way. The government concealed its use of a State agency to compel defendant to bear witness against himself, used the illegally obtained statements to develop its theory of guilt and gather other evidence to support it, and deprived defendant the use of impeachment evidence against a key government witness.

In addition to this due process and Fifth Amendment claim, defendant raises an intervening change of law in support of his claim for relief under the Sixth Amendment's right to confrontation. The government created and used the grand jury testimony of an indicted co-conspirator against defendant. Defendant was not

allowed an opportunity to cross examine this unreliable hearsay.

Finally, petitioner challenges the validity of his sentences. The sentences imposed on Counts 2, 6 and 7 were "in excess of the maximum authorized by law." (See 28 USC 2255.) The trial judge "was without jurisdiction to impose such a sentence." The excessive sentences on Counts 2, 6 and 7 skew the guideline computation for the sentence imposed under Count 1 and, consequently, render it incorrect.

Defendant is entitled to an order that sets aside the judgment of conviction and sentence. He should either be discharged or be tried again. Regardless of his right to relief from the judgment of conviction, defendant has a right to re-sentencing in order to receive a correct sentence.

OVERVIEW OF *KYLES V. WHITLEY* AS IT APPLIES TO CONSTITUTIONAL VIOLATIONS IN THIS CASE

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), is the most recent decision of our Supreme Court on the issue of the "prosecution's affirmative duty to disclose evidence favorable to a defendant". 115 S.Ct. at 1565. Curtis Lee Kyles was convicted of murder and sentenced to death. The Louisiana Supreme Court affirmed. On state collateral review, the trial court denied relief and once again the Louisiana Supreme Court affirmed. Kyles petitioned for writ of habeas corpus in the U.S. District Court, Eastern District of Louisiana. Kyles' petition was denied, and the Fifth Circuit affirmed. Thus Kyles lost in every court that considered his case, until he got to the U.S. Supreme Court, which reversed his conviction and or-

dered a new trial. The Court reversed because the prosecution failed to disclose before trial, material evidence which would have been exculpatory or impeaching.

The *Kyles* court discusses the evolution of the law with respect to the issue at bar, citing first the seminal case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "*Brady* held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" See *Kyles v. Whitley*, 115 S.Ct. at 1565. The *Kyles* court then proceeds to *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *Agurs* "distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that *the prosecution introduced trial testimony that it knew or should have known was perjured.*" (Emphasis added.) 115 S.Ct. at 1565. This rule of law is directly applicable to the case at bar. As will be shown, the government suppressed a letter (Exhibit 2) written by W. Chuck Grace (U.S. District Attorney) on May 2, 1995. (The defense only discovered this letter on July 1, 1999.) This letter, this "previously undisclosed evidence", reveals that the government introduced trial testimony through James Grogan which the government knew, or should have known, was false.

Kyles cites to *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), a case in which "the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e. the 'specific request' and 'gen-

eral-or-no-request' situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles*, 115 S.Ct. at 1565.

It is not necessary for an accused to show by a preponderance that disclosure would have resulted in acquittal. The burden on the accused is much lighter than that. The first of the four aspects of materiality which the *Kyles* court explains, is the "reasonable probability" test.

> "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " 115 S.Ct. at 1566.

The second aspect of materiality is that a *Brady* violation occurs if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 115 S.Ct. at 1565.

The third aspect is that there is no harmless error analysis. Any *Brady* violation is prejudicial error. 115 S.Ct. at 1665-66. This is extremely important to emphasize. If the accused on a 2255 motion establishes *only one Brady* violation, that is enough to require that the judgment of conviction be vacated and set aside. In the

case at bar, the defense will show at least three, and will identify others that can be shown if the accused is allowed discovery under the F.R.C.P. (See Rule 6 of Rules governing 2255 motions.)

The fourth and final aspect of materiality, is the "cumulative effect" test. That is, the government cannot rebut a *Brady* claim by isolating individual items of evidence that were suppressed. Although it is true that "showing that the prosecution knew of an item of favorable evidence does not amount to a *Brady* violation, without more"; it is equally true that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." 115 S.Ct. at 1567. As *Kyles* explains: "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"; and citing *Agurs*: "The prudent prosecutor will resolve doubtful questions in favor of disclosure." 115 S.Ct. at 1568. Finally, in language seemingly written for the case at bar, the *Kyles* court concludes its teaching on materiality with this:

> "This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice be done.' (Citation). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 115 S.Ct. at 1568-69.

The trial in the case at bar was not a due process proceeding as contemplated by the Fifth Amendment.

That is because the government suppressed material evidence that was exculpatory or impeaching; and because there were other constitutional violations which were prejudicial as a matter of law. In the Points and arguments that follow, the defendant will articulate with specificity each individual reason why his judgment of conviction and sentence should be vacated. Attached to this memorandum and incorporated by reference, are exhibits which demonstrate that the government did suppress material evidence.

Your movant believes that discovery will reveal further *Brady* violations. Accompanying the 2255 motion, is a separate motion which requests that the defendant be allowed to conduct discovery under the Federal Rules of Civil Procedure. (See Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts.)

POINT 1

RECENTLY DISCOVERED EVIDENCE REVEALS THAT THE GOVERNMENT, THROUGH SUBTERFUGE, COMPELLED DEFENDANT TO BEAR WITNESS AGAINST HIMSELF, CONTRARY TO THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE GOVERNMENT SUPPRESSED MATERIAL EVIDENCE: A LETTER FROM THE U.S. ATTORNEY, MR. GRACE, TO THE ADMINISTRATOR OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, THAT CAUSED DEFENDANT TO BEAR WITNESS AGAINST HIMSELF. THE GOVERNMENT'S FAILURE TO PRODUCE THE LETTER WAS A *BRADY* VIOLATION AND PREVENTED SUPPRESSION OF THE STATEMENT MADE TO THE ARDC. THE GOVERNMENT'S USE OF DEFENDANT'S STATEMENT VIOLATED HIS RIGHT AGAINST SELF INCRIMINATION.

The Fifth Amendment provides: "No person shall be . . . compelled in any criminal case to be a witness against himself". In the case at bar the defendant was compelled by the government to be a witness against himself in a criminal case.

On May 2, 1995, the U.S. Attorney wrote a letter to the Administrator of the Attorney Registration and Disciplinary Commission that sought an ARDC investigation of Amiel Cueto. The letter included information gathered in a federal investigation into Cueto and ended with a singular request:

> "Concerning any investigation, our office would prefer that any investigation you may begin be *placed on hold after your responsive statement is received from the subject.* In the event this is problematic, please do not hesitate to call either myself or the United States Attorney Criminal Division Chief, Michael Carr, to discuss this aspect." (Emphasis added.)

The letter is attached hereto as Exhibit 2. It was suppressed by the prosecution and never disclosed to the defense. The defense discovered the Grace-letter on July 1, 1999, when one of the defendant's lawyers was allowed to inspect defendant's file in the Chicago office of the Administrator of the Attorney Registration and Disciplinary Commission (ARDC). Thus, defendant was *compelled* to respond to criminal allegations by ARDC action taken at the government's request. His responsive statement was shared by the ARDC with the government and portions of the it [sic] were offered as evidence against Mr. Cueto. The government wrongfully withheld Mr. Grace's letter from defendant. The Grace letter was unavailable for use at trial or on appeal; it was hidden from judicial scrutiny until now.

A *Brady* violation stems from suppression of the May 2, 1995 letter, written by the U.S. Attorney to the Administrator of the ARDC. The letter, in its entirety, is attached hereto as Exhibit 2. This letter was favorable to the defense. Its disclosure before trial would have rendered inadmissable not only Government Exhibit 40 (see Appendix, Exhibit 3), but also virtually all the evidence the Government introduced against the defendant. Its disclosure would have also impeached a key Government witness - James Grogan. Moreover, the Grace letter reveals that the prosecution introduced trial testimony that it knew or should have known was

false ("a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is *any reasonable likelihood that the false testimony could have affected the judgment of the jury.*" (Emphasis added.) *Kyles v. Whitley*, citing *U.S. v. Agurs*, see 115 S.Ct. at 1565. See also footnote 7, 115 S.Ct. at 1565. The Grogan testimony is the subject of Point 2.)

The law which is applicable to the issue of whether defendant was "compelled in (the) criminal case (at bar) to be a witness against himself" is found in: ARDC Articles I and II, and Supreme Court Rule 766, attached in the appendix as Exhibit 4; *In Re Zisook*, 88 Ill.2d 321, 430 N.E.2d 1037, 58 Ill.Dec. 786 (1981); and *U.S. v. Monahan*, 681 F.Supp. 490 (N.D. Ill. 1988).

The law applicable to the issue of the materiality of the Grace-letter, is found in: *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed.2d 694 (1966); *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); and *U.S. v. North*, 920 F.2d 940 (D.C. 1990).

The Administrator of the ARDC investigates and prosecutes ethical violations against Illinois lawyers. In Article I of the ARDC Rules, the Preamble, the Commission states:

> "The courts, the public, the bar, and the respondent have a vital interest in an early determination of any charge which bears upon the fitness of an attorney to practice his profession. The elimination of unnecessary delay was a major objective of the Court in creating the Commission and establishing the office of the Administrator. Implementation of this objective is one of the principal purposes of the following rules."

Rule 2(e) defines the "complaining witness" (CW) as the person making the charge; Rule 53 imposes on all Illinois lawyers the rigid duty to respond within 14 days to any "request" from the Administrator that the lawyer answer charges or provide information.

In Re Zisook, in the opening sentence, informed: "These disciplinary cases concern the scope of an attorney's Fifth Amendment privilege against incriminating himself during proceedings before the Attorney Registration and Disciplinary Commission." 430 N.E.2d at 1034. The Illinois Supreme Court said that Illinois lawyers have no right to exercise the Fifth Amendment in ARDC proceedings:

> "Inasmuch as an attorney is an officer of this court and is licensed by this court to exercise the privilege of practicing law, an attorney has an obligation to cooperate with this court and its agency, the Attorney Registration and Disciplinary Commission, in the performance of its duty to police the legal profession of this State. To allow an attorney to claim the privilege (against self-incrimination), especially when he is the primary source of information, severely hinders the effort of the Commission." 430 N.E.2d at 1041.

There is one exception to the rule: "If the witness is under investigation in a criminal matter, the judge (hearing the Fifth Amendment claim) should pay added consideration to his assertions. Also, close questions should be resolved in favor of the witness." 430 N.E.2d at 1043.

Although a lawyer under ARDC investigation has virtually no right to assert the Fifth Amendment, the lawyer knows that a strict rule of confidentiality and

privacy cloaks ARDC proceedings. See Rule 766, attached as Exhibit 4. The lawyer also knows he will be protected by the Administrator's practice of informing him when he is under federal criminal investigation, so that the lawyer may present his Fifth Amendment claim *before* he answers the Administrator in an ARDC investigation.

In *U.S. v. Monahan*, the Administrator of the ARDC advised two lawyers under investigation, that they were also the subjects of a federal-grand jury investigation: "Specifically, the ARDC advised petitioners that on or about March 13, 1985, the ARDC had received a grand-jury subpoena calling for production of the ARDC's investigative file relating to the petitioners' case." 681 F.Supp. At 491. The lawyers then invoked their Fifth Amendment right against self-incrimination in the ARDC proceedings, pursuant to *In Re Zisook*. However, the Illinois Supreme Court denied them the right to do so, despite the fact that the lawyers were under federal criminal investigation. The Illinois Supreme Court held the lawyers in criminal contempt and sentenced them to three months in jail.

The federal district court issued its habeas writ, freeing the lawyers:

> "The sanctity of the Fifth Amendment has been proclaimed so often that the court need not do it again here. But in light of the nature of this case, a brief review of the values underlying the privilege of self-incrimination is appropriate. The privilege is founded in part on a societal 'preference for an accusatorial rather than an inquisitorial system of justice' and reflects 'our unwillingness to subject those suspected of crime to the cruel trilemma of

self-accusation, perjury or contempt.'" 681 F.Supp. At 498.

However, the holding of *Monahan* was on the narrow ground that the Illinois court should have given the lawyers the opportunity to purge the contempt before they were sentenced. Therefore, all Illinois lawyers remained on notice that it is virtually impossible to invoke the Fifth Amendment in ARDC proceedings. Moreover, in *Monahan*, as contrasted with Mr. Cueto's case, the Administrator had informed the lawyer under ARDC inquiry that he was under simultaneous federal criminal investigation, so that the lawyer did have the opportunity to at least present his Fifth Amendment claims before he answered the Administrator's demands for information.

In an ARDC investigation, the Administrator is under a high duty to bring the matter to an early determination. If a lawyer is under a simultaneous federal criminal investigation, to the Administrator's knowledge, the lawyer should be informed, so that he can invoke the Fifth Amendment. That is because, absent a criminal investigation, the lawyer is required, indeed he is *compelled*, to be a witness against himself. If, as in *Monahan,* the lawyer refuses to answer, he will be subject to a jail sentence for contempt. However he is also secure in the right under Supreme Court Rule 766, that the evidence he provides against himself will be confidential and private; that the Administrator is prohibited from disclosing that which the lawyer was *compelled* to write or say in response to the Administrator's inquiry, absent an order by the Illinois Supreme Court.

On May 2, 1995, the U.S. Attorney wrote a letter to the Administrator of the ARDC concerning Amiel Cueto. He

shared aspects of his investigation into Cueto with the Administrator:

> "Concerning any investigation, our office would prefer that any investigation you may begin *be placed on hold after your responsive statement is received from the subject*. In the event this is problematic, please do not hesitate to call either myself or the United States Attorney Criminal Division Chief, Michael Carr, to discuss this aspect." (Emphasis added.)

This letter is date-stamped on May 10, 1995. Sari Weissman, a lawyer in the Administrator's Office, sent a memorandum to the "Docketing Clerk", dated May 11, 1995, the text of which is as follows: "Instructions: Please open a new CI (Confidential Investigation) with Amiel Cueto as R (Respondent) and Attorney Report (of W. Chuck Grace) as CW (Complaining Witness). Thanks!" See Exhibit 5.

This memorandum from Sari Weissman, clearly evidence favorable to defendant, was also withheld from defendant which is a separate *Brady* violation.

As of May 11, 1995, the Administrator of the ARDC was obliged to advise the defendant:

1) That he (the defendant) was the "subject" of a federal criminal investigation;

2) That the Administrator was acting beyond the role of ethics investigator, with no intent to expeditiously pursue the ARDC investigation as ARDC Rules require;

3) That the defendant's right of confidentiality and privacy was subject to future requests from federal

prosecutors and that his responsive statement could be used against the defendant in a criminal prosecution;

4) That ARDC Rule 53 was being used to compel the defendant to be a witness against himself in a criminal case; and

5) That the defendant had a right to invoke the Fifth Amendment.

The defendant would have invoked his Fifth Amendment right, and declined to be a witness against himself in the criminal case. (See Exhibit 6 in the appendix, which is a letter from AUSA Miriam Miquelon to the defendant dated May 31, 1996, more than a year after the Grace letter. The defendant was told he was a target of the federal grand jury. He was invited to testify before that grand jury; an offer he in fact declined on grounds of the Fifth Amendment.) If the Government had followed the rules, the defendant would not have been induced to forego his constitutional right against self-incrimination. The Government's subterfuge successfully resulted in a compelled written statement in response to ARDC question. Portions of that statement were entered in evidence by the Government as a confession.

Judge William D. Stiehl sent a letter to the ARDC in Springfield, Illinois, dated May 9, 1995. This letter also attached the same Sylvester Jackson "Stipulation of Fact" that had been included in the Grace letter. Judge Stiehl's letter of course did not request the ARDC to compel the defendant to file a written explanation of the charges with the ARDC and then place it's investigation on hold, in contrast to the Government prosecutor's earlier letter to the ARDC. Judge Stiehl's letter is Exhibit 7 in the appendix. Judge Stiehl's letter was

date-stamped in Springfield as being received on May 11, 1995, the same day that Sari Weissman instructed the docketing clerk to make W. Chuck Grace the complaining witness. See Exhibit 5.

On May 19, 1995, Sari Weissman wrote the formal "charge letter" to the defendant. See Exhibit 8 in the appendix. Even though Grace had been docketed as the "CW", Weissman's letter to the defendant only indicated that Judge Stiehl was the complaining witness. The Administrator is required to identify to the respondent "the person making the charge". The "person making the charge" is defined in Rule 2(e) as the "complaining witness", which the Weissman memorandum (Exhibit 5) indicates was W. Chuck Grace. At the very least both Grace and Judge Stiehl should have been listed as complaining witnesses and both identified to Mr. Cueto.

When the defendant received the Administrator's letter and "request" that he respond in writing within 14 days, pursuant to ARDC Rule 53, he assumed that he was not permitted to invoke the Fifth amendment (see *In Re Zisook*), and that to attempt to do so would result in a contempt-citation and jail sentence (see *U.S. v. Monahan*). Defendant was falsely secure in his right under Illinois Supreme Court Rule 766 that his written testimony would remain confidential and private.

The Administrator's letter to the defendant listed thirteen alleged violations of the Rules of Professional Responsibility, but then it commanded the defendant to "send me (the Administrator's Office) a letter within fourteen days responding to your role in the criminal conspiracy outlined in the Stipulation of Facts." The Administrator then told the defendant: "In addition, address the following issues". Thereafter, six numbered

paragraphs required that the defendant answer an exhaustive and comprehensive set of allegations. In paragraph 4 of the six questions, defendant was warned not to assert the attorney-client privilege.

Given the suppression of the Grace letter to the ARDC, and its content, defendant is uncertain of precisely who formulated the questions. A clear inference may be drawn that the questions were submitted for answer in an investigation initiated at the behest of the U.S. Attorney and in tandem with a federal probe. The ARDC Administrator was solicited to assist the U.S. Attorney by allowing the federal inquiry to proceed in lieu of the ARDC investigation but, only after defendant was made to answer questions of direct interest to prosecutors conducting the criminal investigation. Regardless of the source of the questions that the defendant was compelled to answer, the possibility that the questions were formulated by and submitted for federal prosecutors was clearly concealed from defendant in violation of his constitutional guarantee against self incrimination.

The defendant complied with the Administrator's demand. He wrote a detailed letter in answer to the Administrator. The U.S. Attorney's Office then took this compelled statement, and used it against the defendant in two ways: First the part which the U.S. Attorney thought was exculpatory was edited out, leaving the inculpatory sections. These were compiled into Government Exhibit 40 (see Appendix, Exhibit 3) and were introduced against the defendant at trial. Second the part that was exculpatory (see Exhibit 9 in the appendix) was used by the prosecutor to structure its prosecution, to modify its conspiracy theory so as to fit a prosecution which could overcome and circumvent the

defendant's known defenses, and to prepare Government witnesses. For example, the prosecutors had drafted a Stipulation of Facts for Sylvester Jackson to sign, which purported to implicate the defendant in a criminal conspiracy. The theory contained in the Jackson's stipulation, was founded on the premise that Chief-of-Police-of-Washington-Park Robert Romanik approached Mayor-of-Washington-Park Sylvester Jackson in August of 1992, with the plan that the conspirators (which was supposed to include the defendant), should set Bonds Robinson up. In the defendant's compelled written response to the ARDC, (see Exhibit 9), he proved that this could not have happened, *because Romanik was not chief in August of 1992*. Romanik had been fired in April 1992, and re-hired in June 1993 (see Exhibit 9). When the prosecution received defendant's response, the Government modified its conspiracy theory.

Defendant was clearly compelled to be a witness against himself in the criminal case. The Grace-letter and the Weissman memorandum establish this point. But equally important is that the Fifth Amendment violation follows from the compelled statement - the prosecution's use of the compelled information to frame a modified conspiracy theory and to assemble evidence and prepare witnesses to overcome defendant's known defenses.

The applicable law on this second prong is *Miranda v. Arizona, Kastigar v. United States,* and *U.S. v. North.* In *Miranda*, our Supreme Court taught that a Fifth Amendment violation is not rebutted by a Government claim that the compelled statements are part exculpatory:

> "No distinction can be drawn between statements which are direct confessions and statements which

> amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'. If a statement were in fact truly exculpatory it would, of course, never be used by the prosecution." 384 U.S. at 476-77.

Thus the fact that the inculpatory parts of the defendant's compelled statements were "used by the prosecution" as evidence against him at trial, requires that defendant's judgment of conviction be vacated. But the fact that the *exculpatory* parts were also "used by the prosecution", is an additional reason why a new trial is required, preceded by a *Kastigar* hearing.

Kastigar is squarely on point with the case at bar. When a person is compelled to be a witness against himself: "prosecutorial authorities (are prohibited) from using the compelled testimony in *any* respect, and (the Fifth Amendment) therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (Italics in the original.) 92 S.Ct. at 1661.

Kastigar sets down the rules that govern any prosecution subsequent to a witness' having been compelled to testify against himself:

> "(T)he federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' (Citing authority.) This burden of proof, which we reaffirm as appropriate,

> is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 92 S.Ct. at 1665.

This "heavy burden of proving that all of the evidence it (the prosecution) proposes to use was derived from legitimate independent sources" must be established at a *Kastigar* hearing. See 92 S.Ct. at 1665. If the Grace-letter had not been suppressed, a *Kastigar* hearing is exactly what the defendant would have received. The evidence derived directly or indirectly from defendant's compelled testimony would have been held to be inadmissible. This tainted evidence comprised the most damaging evidence in the case.

The well-known case of *U.S. v. North* is also on point. Oliver North was compelled to testify before a joint committee of both houses of Congress, under a grant of Congressional immunity, regarding his role in the Iran-Contra affair. Subsequent to North's being compelled to testify, he was prosecuted for crimes alleged to be associated with Iran Contra. He was convicted, however the D.C. Court of Appeals reversed. The *North* opinion could have been written for the case at bar.

> "*Kastigar* is instead violated whenever the prosecution puts on a witness where testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony." (Italics in the opinion.) 920 F.2d at 942.

This holding applies directly to James Grogan. It applies to Reginald Joseph, the FBI Agent in Charge who testified against the defendant as an "expert"

Government witness. (Agent Joseph opined that the defendant had committed "Misprision of a felony" - a crime with which the defendant was *not* charged - because the defendant had failed to report his client Venezia to the FBI in 1992.) The *North* holding that *Kastigar* is violated whenever a prosecution witness' testimony is shaped *directly or indirectly*, also applies to Government witnesses Dorgan, Daley, LeChien, Haida, Montalvo, Jackson, and Nations. These witnesses were prepared and coached extensively by prosecutors. There exists a "reasonable probability" that their testimony was shaped, directly or indirectly, by information obtained from defendant's compelled statement.

Here, the U.S. Attorney was the architect of a plan to compel the defendant to be a witness against himself, and to force the defendant to write a detailed and comprehensive statement explaining his answers to the prosecution's conspiracy theory. *North* goes even further, explaining that prosecution witnesses who are exposed indirectly to compelled testimony, "can (be) taint(ed) ... irrespective of the prosecution's role in the exposure". 920 F.2d 942. Therefore a *Kastigar* hearing is necessary. Indeed, the *North* court is adamant: "Most important, the defendant is entitled to a *hearing* at which he would be able to challenge the prosecution's case" that the "witnesses who testified against the defendant did not draw upon the (compelled) testimony to use it against the defendant". (Italics in the opinion.) 920 F.2d 943.

The suppression of the Grace letter was a *Brady* violation, as was the Weissman memorandum, because each document was exculpatory on the Fifth Amendment violation. The disclosure of the Grace letter would have triggered a *Kastigar* hearing. There is at the very

minimum a "reasonable probability" that the trial result would have been different; certainly the suppression of the evidence undermines confidence in the verdict.

The Grace letter and Weissman memorandum were also impeaching of James Grogan, Chief Counsel of the Administrator of the ARDC, and a Government "expert witness" at trial. The suppressed documents would have provided fuel to challenge Grogan's impartiality. His opinions could have been judged in light of a bias demonstrated through unprecedented use of his offices to wrongfully procure evidence for the prosecution. Moreover, his credibility would have suffered exposure of a willingness to use deception to assist the government's pursuit of defendant. (See *Kyles v. Whitley*, 115 S.Ct. at 1570.)

Mr. Cueto, a year and a half prior to his indictment, had used his newspaper to taunt and humiliate the U. S. Attorney, the F.B.I. and ARDC. The verbal attacks were personal and outrageous. We do not agree with or condone this, and while they may make the conduct of the U. S. Attorney and Mr. Grogan understandable, they certainly do not justify the violation of Mr. Cueto's right to a fair trial. The ends do not justify the means in constitutional jurisprudence.

For all the foregoing reasons, the suppression of the Grace letter and the Weissman memorandum are *Brady* violations. Any *Brady* violation can never be harmless error. A new trial is required.

POINT 2

THE INTRODUCTION OF TESTIMONY WHICH THE GOVERNMENT KNEW WAS PERJURED COULD HAVE AFFECTED THE JUDGMENT OF THE JURY AND ON THIS BASIS ALONE, A NEW TRIAL IS REQUIRED.

The Government knowingly introduced false testimony of James Grogan, which raises a "reasonable likelihood that the judgment of the jury *could have been affected*." (Emphasis added.) See *Kyles v. Whitley*, Footnote 7, 115 S.Ct. at 1565. On that basis alone defendant is entitled to a new trial.

Mr. Grogan in trial stated: "Lawyers cannot put any evidence on - cannot - that is false. They cannot make false representations to a judge or jury ... An omission to a judge of a material factor could be the same as just outright lying." (See volume 22 of the trial transcript at pages 113-14.) The irony of this testimony is apparent. Mr. Grogan omitted to report the Grace letter. Mr. Grogan omitted to report that his office docketed Mr. Grace as the complaining witness. This omission, according to Mr. Grogan himself, is tantamount to an outright lie.

At page 181 of volume 22 of the trial transcript, Mr. Grogan says his "recollection" is that Grace "wrote us to inform us about certain information that had come to his attention and asked us *to stay any formal proceedings* until the conclusion of any proceedings." (Emphasis added.) Grogan clearly wants the jury to infer that Grace had written *after* the Administrator had already begun an investigation. Grogan didn't candidly tell the jury that it was Mr. Grace who had *initiated* the investigation. What Mr. Grace *told* the Administrator was:

"(O)ur office would prefer that any investigation *you may begin* be placed on hold *after your responsive statement is received from the subject.*" (Emphasis added. See Exhibit 2.)

At page 181, lines 18-19 of volume 22 of the trial transcript, right after Grogan has finished saying that Grace "asked us (that is, the Administrator and Grogan) to stay any formal proceedings", defense counsel asks: "And that was any type of investigation you were doing into Mr. Cueto *at that time*, is that correct?" (Emphasis added.) Mr. Grogan should have said: "No sir, that's incorrect. We were not doing any investigation into Cueto *at that time.*" But instead, Mr. Grogan falsely stated "That would be correct sir." The Grace letter initiated the investigation.

Now that Mr. Grace's letter has been discovered, it is clear that defense counsel would have been able to subject Grogan to "a withering cross-examination"(see *Kyles v. Whitley*, 115 S.Ct. at 1570), if the Government had not wrongfully suppressed the Grace letter and its progeny. At page 187 of volume 22 of the trial transcript, Mr. Grogan is asked:

Line 14: Q (Defense Counsel): So basically this is a 42-page account of Cueto's side of the story?

His answer would have been seriously impeached had the Government disclosed the Grace letter and Weissman memorandum to the defense. Grogan answered:

Line 16: A (Grogan): It (the Cueto letter) is a response to a matter that was brought to our attention by the Honorable William D. Stiehl.

In light of the "previously undisclosed evidence" (*Kyles*), that being the Grace-letter, we know that Mr. Grogan's sworn testimony was fraught with falsehoods. Mr. Grogan was offered as an expert Government witness. The critical importance of the false testimony of Mr. Grogan raises a reasonable likelihood that the judgment of the jury could have been affected. Mr. Grogan's opinions originated with the Grace-letter and ultimately denied the defendant the due process he was entitled to under the Constitution.

POINT 3

PREVIOUSLY UNDISCLOSED EVIDENCE REVEALS THAT THE JUDGE WHO PRESIDED OVER THE TRIAL WAS BIASED OR THAT THERE WAS AN APPEARANCE OF RULE 11 IMPROPRIETY, REQUIRING A NEW TRIAL.

A) THE TRIAL JUDGE, IN VIOLATION OF THE BRIGHT-LINE PROHIBITION CONTAINED IN RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WAS INVOLVED IN THE PLEA NEGOTIATIONS BETWEEN THE GOVERNMENT AND ROBERT ROMANIK OR APPROVED OF A PLEA WHICH RESULTED IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

Rule 11 of the Federal Rules of Criminal Procedure absolutely prohibits any judicial involvement in the plea negotiations between the government and a defendant.

This prohibition is a bright-line rule which permits no exceptions. Further, violation of the rule is plain error,

never harmless, the only remedy for which is reversal followed by reassignment of the case to a different judge upon remand. *United States v. Bruce*, 976 F.2d 552 (9th Cir. 1992); *United States v. Adams*, 634 F.2d 830 (5th Cir. 1981); *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993); *United States v. Barrett*, 982 F.2d 193 (6th Cir. 1992); *United States v. Kraus*, 137 F.3d 447 (7th Cir. 1997). This issue is appropriate for §2255 relief. *Murchu v. U.S.*, 926 F.2d 50 (1st Cir. 1991).

Robert Romanik was charged in the same indictment as the defendant. He pleaded guilty to Count 5 of that indictment, obstruction of justice in violation of 18 U.S.C. §1503. The defendant was not charged in the Count to which Romanik pled guilty. Mr. Romanik was sentenced to probation on his plea on July 18, 1997, after the jury trial of the defendant. During Romanik's sentencing there occurred a highly unusual two and one-half hour conference in chambers of which no record was made.

Romanik's sentence of probation was later revoked because of charges that he committed bank fraud in loan transactions which did not involve the defendant. At Mr. Romanik's sentencing for violating his probation, Judge Limbaugh's involvement in the prior plea was disclosed.

Attached hereto as Exhibit 10, is the transcript of Robert Romanik's sentencing for violating his probation. This hearing was conducted before Judge Limbaugh on January 25, 1999, more than a year after the defendant was sentenced. At page 6, line 15, Judge Limbaugh admits his involvement in the prior plea negotiations:

> "Let me give my reasons for making this decision. At the time that I accepted the plea agreement - at

this stage I do not think I'm remiss in saying, and I make no excuses for this, it was against my better judgment. *There was considerable discussion among counsel and with me about the plea bargaining in this matter. I finally determined* that it would be appropriate to accept the result of the plea bargaining, and having accepted that I did make the determination pursuant to the agreement of the parties, that is both the defendant and the government, to find that there was a total offense level of ten, a criminal history category of one. I feel that in a resentencing because of a probation violation it would be inappropriate *for me to deviate from my part of the bargain*. I agreed to what the range of punishment should be, I sentenced the defendant within that range and I think it would be inappropriate for me to change that range." (Emphasis added.)

Notably, Judge Limbaugh recounts the "considerable discussion *among counsel and with me*" regarding the plea bargaining, which Judge Limbaugh "finally determined" to accept. Later, Judge Limbaugh acknowledges his compulsion "to keep my part of the bargain".

The record of Mr. Romanik's plea does not contain the "considerable discussion among counsel" and the court, which Judge Limbaugh referred to for the first time on January 25, 1999. Rule 11(e)(2) requires that the plea agreement be disclosed "on the record . . . in open court". While the rule does allow for an in camera offer upon a "showing of good cause", no such procedure was utilized in Romanik's initial plea. Therefore, by the trial judge's own comments it is clear that an "off the record" discussion occurred between Romanik (or his counsel) and the government which clearly was not done in "open court".

This alone constitutes a violation of Rule 11 and requires that the defendant's conviction be vacated, since it is indicative of a bias that arose before trial. See *Murchu v. U.S.*, 926 F.2d at 57, where the court, on review of a §2255 motion, remanded a case to determine what off-the-record plea negotiations involving the trial judge occurred.

Romanik's plea, or more precisely his change of plea from not guilty to guilty, occurred at 5:00 p.m., when the doors to the courthouse are typically locked and all public access is thereafter denied. No written notice of the change of plea occurred.

Through either discovery or at a hearing the defendant believes evidence can be adduced which would establish even more unusual features of Romanik's plea and compound the appearance of Rule 11 impropriety than that established by the trial judge's own comments. The defendant believes that, although Romanik's plea ostensibly required a 12-18 month prison sentence, in fact, he was promised by the government and by his own lawyers that he would be given probation. Moreover, this was a promise to which the Court agreed. When, in fact, Romanik was sentenced on July 18, 1997 the government sought to impose a sentence of imprisonment. A two and one-half hour break was taken, Judge Limbaugh sent for his notes from St. Louis and in a highly unusual "off the record proceeding" determined that Romanik was to receive probation. Probation and a term of home confinement is what the court ultimately imposed.

There were even more unusual terms in Romanik's "deal". He agreed that he would not testify for *either* side. Romanik also signed a "secret" affidavit which was

placed in the custody of the F.B.I. and which could not be released without court order. See Exhibit 11. Judge Limbaugh and his secretary were quoted as saying that this affidavit was so inflammatory that people would flee if its contents were revealed. These comments, widely quoted, were very prejudicial to the defendant.

After the defendant was convicted, in sentencing pleadings the government quoted from Romanik's secret affidavit, which had not been disclosed - and still has not been disclosed - to the defendant or his lawyers. Nor did the government get an order unsealing the "affidavit" prior to using it. Through discovery or at a hearing the defendant believes that he can establish that the purpose of the secret affidavit was to insure that Romanik would be unavailable as a defense witness. After the defense rested its case, the government sought to call Romanik in rebuttal but was thwarted when Romanik's lawyers wrote a letter to D.O.J. officials in Washington, D.C. to make the local office live up to its part of the bargain - that Romanik not testify for either side. The defense was unaware of this information until after the defendant's conviction was affirmed by the Seventh Circuit. Thus, it could not be raised on appeal.

Judge Limbaugh allowed the government to introduce Romanik's grand jury testimony at trial, although he was legally and physically available to testify but for his "deal". [This ruling itself requires a new trial, based upon the recent Supreme Court case of *Lilly v. Virginia*, 119 S.Ct. 1887 (June 10, 1999); see Point 4, *infra*.]

As previously discussed, the case law and Rule 11 are explicit: there can be no judicial involvement at all in plea negotiations. That would be especially true for

those plea agreements such as Romanik's, which contain "secret" clauses - promises of probation and promises that one will not testify. Rule 11 simply does not permit "off the record" plea agreements. Nor does Rule 11 permit a judge to be involved in agreements which have the effect of "fencing off" potential witnesses.

The leading Seventh Circuit case on Rule 11 is *U.S. v. Kraus*, 137 F.3d 447 (7th Cir. 1998). In *Kraus*, the Seventh Circuit found that, although a literal violation of Rule 11 had not occurred, the judicial involvement in the plea negotiations raised at least the appearance of impropriety. The facts in *Kraus* are that the trial judge rejected a plea agreement that would have capped the defendant's incarceration at 121 months. Such a rejection of a plea does not violate Rule 11. Later however, in a discussion with a court clerk, of which the Judge had no knowledge, the parties were told by the clerk that a cap of 151 months would have "credence" with the judge. The judge's comments rejecting the 121 month plea also supported the notion that the judge would accept a cap of 151 months. The new agreement did in fact cap the sentence at 151 months.

On appeal, the Seventh Circuit noted that excluding the Judge from plea negotiations serves three purposes: it minimizes any judicial coercion resulting in a guilty plea, it preserves the impartiality of the court and it avoids any appearance of impropriety. *Kraus*, 137 F.3d at 447. Ultimately, based upon the Court's comments when it rejected the initial 121 month cap and the later discussion with the Court Clerk, the appellate court held that, although a literal Rule 11 violation had not occurred, the appearance of impropriety was sufficient to vacate the plea and remand to a different judge. The cases cited previously at the beginning of this section, are all consistent with this approach.

These cases make clear that *any* form of judicial participation in plea negotiations, beyond accepting or rejecting same in open court on the record, is a violation of Rule 11. The Rule's mandate that, "The court shall not participate in any such discussions (plea agreement) establishes an 'absolute prohibition on *all* forms of judicial participation in or interference with the plea negotiation process.'" *U.S. v. Adams*, 634 F.2d 830, 835 (5th Cir. 1981) citing *U.S. v. Werker*, 535 F.2d 198 (2nd Cir. 1975). Moreover, "before the parties have concluded a plea agreement and have disclosed that final agreement in open court, the judge must refrain from *all forms* of plea discussions." *U.S. v. Bruce*, 976 F.2d 552, 555-6, (9th Cir. 1992). Clearly, by the trial judge's own comments, that "bright line rule" was violated here.

Given the Judge's own acknowledgment of participation in the plea bargain, there is much greater evidence of judicial involvement in Romanik's unique plea than that which the Seventh Circuit strained to find in *Kraus*. Additionally, this case raises two of the core concerns of Rule 11's prohibition as articulated by *Kraus*: the preservation of judicial impartiality and the avoidance of even the appearance of impropriety.

Romanik's plea occurred in secret proceedings and contained secret, that is non-written, promises of probation; secret, that is non-written, promises not to testify; and secret "affidavits" which are sealed and unsealed at prosecutorial whim and about which highly prejudicial public comments are made by the judge and his staff. Then the government is allowed to admit grand-jury testimony which cannot be cross examined, although the witness is readily available but for his "plea". Judicial participation in such a plea and such a sequence of events does not preserve, but questions, the impartial-

ity of the court. The trial judge's involvement in the negotiations raises at the very least, an appearance of impropriety. (The "impropriety" referred to is that which Rule 11 proscribes, it is the word used in the cases cited, and it is not intended to imply any moral turpitude by Judge Limbaugh.)

At a minimum, this is a case where clearly, as established by Judge Limbaugh's own comments, the record "casts no real light" *Machibroda v. U.S.*, 368 U.S. 487, 494-5, 82 S.Ct. 510, 513-14 (1962). To the extent that the record needs to be expanded, to find out precisely what occurred at Romanik's plea and sentencing and to find out precisely what the facts are regarding that plea and sentencing, discovery pursuant to Rule 6 of the Rules governing §2255 motions should be granted.

Finally, irrespective of Judge Limbaugh's involvement in the plea negotiation; the fact that the Judge would accept a plea with so many "secret" codicils, and would conduct so much of the proceedings off the record, is enough to raise an appearance of Rule 11 impropriety. Alternatively, should the court feel Rule 11 is not directly implicated, under the court's broad supervisory power to prevent fundamental miscarriages of justice, relief should be granted to redress this highly unusual sequence of events which challenge whether Judge Limbaugh usurped his role as a neutral arbiter and became a participant in events which determined what witnesses were unable to be called, by virtue of secret agreements.

The Seventh Circuit has found that "off the record" proceedings conducted by a trial judge are highly indicative of a disqualifying bias. See *Edgar v. K.L.*, 95 F.3d 256 (7th Cir. 1996). In this case, the Seventh Circuit disqualified a trial judge who held in chamber meetings

with a panel of experts whom he had appointed to provide opinions relevant to the case. The Court cited Canon 3A(4) of the Code of Conduct for United States Judges as a basis for its ruling which holds as follows:

> "A judge should . . . except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." *Edgar*, 93 F.3d at 258.

Romanik's plea and sentence related to that plea contained proceedings much like the "in chamber" discussions which were disapproved of in Edgar. The "in chamber" discussions in the case at bar led to:

(1) secret promises of probation;

(2) secret agreements that someone would not be called as a witness;

(3) secret affidavits about which public comments prejudicial to the co-defendant are made and which appear to be designed to keep a witness away from the stand;

(4) the secret affidavit is partially unsealed and used against the defendant at his sentencing;

(5) grand jury testimony of the co-defendant, Romanik, is read to the jury without confrontation or cross examination because Romanik's "secret" deal, made him unavailable as a witness.

Clearly, the "in chamber", off the record discussions here could be said to have involved "communication on the merits, or procedures affecting the merits, of a pending or impending proceeding" in violation of Canon

3A(4). Under the rationale of *Edgar*, substantive §2255 relief is required, either a new trial or the vacation of the defendant's conviction followed by discharge.

B) THE TRIAL JUDGE'S COMMENTS AT THE DEFENDANT'S SENTENCE WERE INDICATIVE OF A BIAS OR AN APPEARANCE OF BIAS, ON THE BASIS OF WHICH, A NEW TRIAL MUST BE ORDERED.

On September 19, 1997, Judge Limbaugh sentenced the defendant to 87 months in prison. At the sentencing hearing, Judge Limbaugh called the defendant to approach the podium in front of the bench, whereupon Judge Limbaugh made the following statement to the defendant:

> "I really feel that one of the jewels of our system is the First Amendment.
>
> "And the First Amendment gives all of us unprecedented rights that other people in the world do not have.
>
> "It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.
>
> "And for that you should be punished."

Judge Limbaugh then proceeded to pass sentence. The judge did not explain what he meant by his personal belief that the First Amendment "does not authorize license". Judge Limbaugh did not explain what he meant by "in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license".

This had to be the personal bias of Judge Limbaugh, because there is no authority for the proposition that the First Amendment does not authorize license, nor is there any authority that the First Amendment is subject to abuse. To the contrary, the exact opposite is true, and our Supreme Court has said so many times. For example, in the well-known flag-burning case, the Court reaffirmed that "the government may not prohibit the expression of an idea simply because society finds the idea itself disagreeable or offensive." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). That single sentence holds that the First Amendment does indeed authorize license, and that the Courts are bound to protect that license, even in the face of overwhelming public indignation and passion.

Judge Limbaugh did not tell us which of the five freedoms in the First Amendment (religion, speech, press, assembly, or petition) the defendant had treated with license and abused. It seems apparent, and it is a reasonable inference, that Judge Limbaugh was offended by the defendant's editorial policy in the *East Side Review*. However it matters not which of the First Amendment rights Judge Limbaugh was referring to. That is because there is no doubt that the First Amendment was violated when Judge Limbaugh said: "And for that (abuse of the First Amendment, treating it with license) you should be punished." The Supreme Court has frequently taught that the First Amendment is violated if a person is punished for exercising his rights under that Amendment. The Court recently reaffirmed that principle.

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), was a case in which evidence of David Dawson's membership in the Aryan Brotherhood

was introduced by the state at Dawson's sentencing hearing. The Supreme Court reversed: "Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs." 112 S.Ct. at 1098. The *Dawson* court also held: "We conclude that ... the Aryan Brotherhood evidence (was) totally without relevance to Dawson's sentencing proceeding". 112 S.Ct. at 1097.

In the case at bar, the trial judge's opinion that the defendant had abused the First Amendment, had treated it with license, was totally without relevance to the defendant's sentencing proceeding. Moreover, the fact that Judge Limbaugh "punished" the defendant because of the trial judge's opinion of the defendant's expressions of opinion, was a First Amendment violation, as *Dawson v. Delaware* held. And finally, the fact that Judge Limbaugh violated the First Amendment in sentencing the defendant for having abused the First Amendment, is indicative of a bias or an appearance of bias.

Thus there is no doubt that the Judge had a disqualifying bias, and that that bias arose before the defendant was "punished", i.e. during or before trial. Although the bias did not manifest itself until sentencing, it requires a new trial. Certainly at the very least, there was an appearance of bias. Judicial bias is never harmless error, it always requires a new trial. See *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

The case at bar is also on all fours with *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). In *Bakker* the court vacated the sentence of a televangelist based upon

the sentencing comments made by the trial judge. Of the defendant Bakker, the court said, "He had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money grubbing preachers or priests*." (Italics in the original.) 925 F.3d at 740. In ruling that the sentencing judge had improperly imposed his own religious test, coupled with punishment for violating it, the appellate court overturned the sentence with the following language:

> "Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed. In this way, we believe that the trial court abused its discretion in sentencing Bakker. Consequently, the sentence is vacated and the case is remanded for resentencing. This resentencing will be carried out by a different district judge to ensure that the ends of due process are achieved." Id. At 740-41.

If one were to substitute First Amendment sensibilities for "religious beliefs" or "religion" or "religiosity" in the above quotation it would be a perfect description of the events at bar. Obviously, Judge Limbaugh was reacting to his personal objection to the defendant's publication, the *East Side Review*, when he sentenced

the defendant to an eighty-seven month term. Moreover, this bias against the defendant had to have arisen before or during trial, when *East Side Review* articles and editorials were discussed with respect to their admissibility. Therefore, a new trial must be ordered.

One final point. It was not possible to raise this issue on direct appeal, because the error had not been preserved. This was Constitutional error of the highest magnitude, a First Amendment violation, which must be remedied on this 2255 motion. (See *Dawson v. Delaware*, even though the defense had *stipulated* to the admission of the Aryan Brotherhood evidence, the Supreme Court reviewed the case anyway. Because of the First Amendment error, the Court granted Certiorari without regard to waiver.) But nevertheless, lead trial counsel should have moved immediately for a new trial, even in the few minutes that elapsed between the Judge's comments, and the actual passing of sentence. The failure to timely raise objection to the trial judge's comments and to timely move for a new trial, "so undermined the proper functioning of the adversarial process (the right to trial by an unbiased judge, which is always prejudicial error and can never be harmless, see *Tumey v. Ohio)* that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984).

CONCLUSION OF POINT 3

On either or both of the above grounds: 1) the acceptance of a plea agreement which challenges the court's role as a neutral arbiter, the conducting of so many secret hearings, the bright-line rule prohibiting the judge's involvement in plea negotiations or other violations of Rule 11; and/or 2) the judge's comments to the

defendant at sentencing; there was a bias, or at least an appearance of bias by the judge which arose before or during trial, and which therefore requires that the judgment of conviction be vacated, and the charge be dismissed or that a new trial be ordered. The Supreme Court case of *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80 (1972) supports the ultimate relief of discharge: "Nor, in any event, may the state's trial court procedure be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* 409 U.S. at 61-62, 93 S.Ct. at 84.

POINT 4

***LILLY v. VIRGINIA*, 119 S.CT. 1887 (JUNE 10, 1999), IS AN INTERVENING CHANGE OF LAW WHICH RENDERS THE ROMANIK GRAND-JURY TESTIMONY INADMISSABLE; REQUIRING THAT AMIEL CUETO RECEIVE A NEW TRIAL.**

On June 10, 1999, the Supreme Court delivered its opinion in *Lilly v. Virginia*, 119 S.Ct. 1887, which has direct application to the case at bar, and which requires that the defendant receive a new trial.

The defendant's co-defendant and alleged co-conspirator, Robert Romanik, pleaded guilty before trial and was sentenced to one-year probation (although that probation has since been revoked). In Romanik's plea agreement, he refused to testify at trial for the Government. However apparently the Government included a provision which required that Romanik make himself unavailable to the defense. See Exhibit 11 in the appendix. This Government-action of depriving an accused of a

defense-witness through a plea agreement is unprecedented.

Romanik had testified before the grand jury on February 22, 1995, approximately a year and a half prior to the handing up of the indictment at bar. At the Cueto trial, the Government convinced Judge Limbaugh to admit into evidence the grand-jury testimony of Romanik. The defendant objected, but his objection was overruled. Under the law as construed by the Seventh Circuit at that time, the trial court's ruling was not error. The trial court cited two Seventh Circuit cases: *U.S. v. Dugan* and *U.S. v. Stephenson* (see Volume 14, page 4 of the transcript). The trial judge also relied on *U.S. v. Curro*, 847 F.2d 325; and on *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The court also quoted "the Gomez Lemor case", which held "that certain grand jury testimony falls within a firmly established hearsay exception." (Vol. 14, page 3).

Lilly v. Virginia, is an intervening change of law which makes clear that the trial court's reliance on those cases was misplaced:

> "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."

Lilly also distinguishes Bourjaily:

> "(Out-of-court statements like Romanik's) when the statements are given under conditions that implicate core concerns of the old *ex parte* affidavit

> practice - that is, when the Government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing (are not admissible)." 119 S.Ct. at 1900.

Lilly is a case which is an intervening change of controlling law; a case which overrules all Seventh Circuit cases to the contrary. *Lilly* applies the Sixth Amendment Confrontation Clause to out-of-court testimony or statements of co-conspirators or accomplices, admitted into evidence against an accused without the accused being allowed to cross-examine the declarant at trial. *Lilly* holds that such evidence is not an exception to the hearsay rule. Just as the taped confession of Mark Lilly (the brother and accomplice of Benjamin Lee Lilly, the accused/petitioner in *Lilly v. Virginia*), was erroneously admitted into evidence because Mark was unavailable to testify; the out-of-court transcribed testimony of Romanik was erroneously admitted against the defendant. *Lilly v. Virginia* is directly on point with the case at bar.

In *Lilly*, the supreme court eloquently explains the history which led the Founders to include the Confrontation Clause in our Bill of Rights. *Lilly* describes: "a particular abuse common in 16th- and 17th-century England: prosecuting a defendant through *ex parte* affidavits, without the affiants ever being produced at trial." "This abuse *included using out of court depositions* and 'confessions of accomplices' (citations)". (Emphasis added.) See 119 S.Ct. at 1894.

Romanik's grand jury testimony was an out-of-court deposition,[sic] Government was involved in the statements' production, indeed the Government elicited the testimony *ex parte*. The Romanik grand jury state-

ments describe past events and have not been "subjected to adversarial testing." 119 S.Ct. at 1900. And *Lilly* also noted: "The analogy (of out-of-court statements like those of Romanik) to the presentation of *ex parte* affidavits in the early English proceedings thus brings the Confrontation Clause into play". 119 S.Ct. at 1894.

Lilly presents the issue succinctly at 119 S.Ct. 1894: "When the Government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the clause permits the Government to deny the accused his usual right to force the declarant 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."' (Citation.)" And *Lilly* answers the issue just as succinctly: "The admission of the untested confession of Mark Lilly violated petitioner's Confrontation Clause rights." 119 S.Ct. at 1901.

Lilly has intervened to render Romanik's grand-jury testimony inadmissible. There is also no question that the admission of Romanik's out-of-court statements was prejudicial error. For this latter conclusion, we only need look to the arguments of the prosecutor at the defendant's trial. At Volume 12 pages 208-18, across ten pages of transcript, the prosecutor forcefully tells the judge that the Romanik grand-jury testimony is essential to prove the indictment. The Government obviously thought that it was of the highest importance to get the Romanik grand-jury statement before the jury, and to do so without subjecting Romanik "to adversarial testing."

This issue calls for §2255 relief because it meets the standard for an intervening change of law under the

plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, if new case law either: (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) "requires the observance of those procedures that ... are implicit in the concept of ordered liberty" *Teague*, 489 U.S. at 307, 310, then these new cases constitute an intervening change of law requiring §2255 relief.

The second ground is especially true with respect to the admission of Romanik's unconfronted grand jury testimony. Under *Lilly* it is clear that the guilt of the defendant may not have been reliably determined. A new trial is required.

POINT 5

THE SENTENCE SHOULD BE VACATED ON THE GROUND THAT THE SENTENCE OF 87 MONTHS IMPRISONMENT AND $80,000 FINE, IMPOSED UNDER EACH OF COUNTS 2, 6 AND 7, WAS IN EXCESS OF THE MAXIMUM ALLOWED BY LAW, AND JUDGE LIMBAUGH DID NOT HAVE THE JURISDICTION TO IMPOSE AN EXCESSIVE SENTENCE.

Before proceeding to the argument under Point 5, it is important to focus on the actual counts defendant was charged with and convicted of.

Count 2: The defendant's crime in this count was the filing of two "false" pleadings. The first was a brief on behalf of a client in a civil injunction case in the Seventh Circuit Court of Appeals. The brief was alleged to be "false" in that it had attached to it as part of the record

on appeal, a statement that the client was "an honest citizen", when the defendant knew or should have known that the client was not honest. The second "false" pleading in Count 2, was a Petition for Writ of Certiorari in the U.S. Supreme Court in the same civil injunction case. This petition was alleged to be "false" in that it was alleged to have "attacked the integrity of the judges of the Court of Appeals", see paragraph 32 of the indictment.

Count 6: The defendant's crime in this count was the writing of two letters to the St. Clair County state's attorney on January 21, 1994 and on June 15, 1994, "to persuade the St. Clair County State's Attorney to indict Agent Robinson". See paragraph 73 of the indictment. (The two letters, marked as Group Exhibit 12, are incorporated by reference as part of this motion, and are attached hereto as part of the appendix.)

Count 7: The defendant's crime in this count, was the act of "preparing" (but never filing), a motion under 28 USC 144 and 455, to disqualify Judge Stiehl. This motion was drafted by the defendant during the pendency of the civil injunction case referred to in Count 2 (but never filed). The evidence at trial was that this motion drafted by the defendant, was allegedly used as a "model" by lawyer Deborah Alessi on behalf of her client, Erin Griffin, in the criminal case *U.S. v. B&H Vending*, 95-CR-30024. See Group Exhibit 13, which is the unredacted motion drafted by Alessi, and the redacted pleadings admitted into evidence at trial in the case at bar. Although Ms. Alessi attempted to file the motion to disqualify Judge Stiehl, Judge Stiehl would not allow her to do so. Please see Exhibit 14, which is the "Minutes of Ruling on Motion to Disqualify Judge Stiehl and Status Conference" of the July 21, 1995 hearing.

"Court advises counsel it has issued an Order stating that no further motions may be filed without first obtaining leave of Court. Court advises Ms. Alessi the motions she attempted to file late yesterday would be returned to her in light of this Order." Under Count 7, the defendant was convicted of obstruction of justice, on the ground that this pleading or court paper was "false", in that in an affidavit signed by Griffin and attached to the motion Alessi attempted to file, Griffin had sworn that she had read the motion, when in fact she had not.

It must be noted that the defense is almost certain that the motion to disqualify Judge Stiehl which the defendant drafted - but never filed - in *Venezia v. Robinson*, and which was later alleged to be the "model" for Alessi's motion to disqualify Judge Stiehl, is the false pleading or court paper the grand jury was referring to in Count 7. However the defense's motion for bill of particulars was denied in its entirety. The Government did not inform the defense during trial as to what the false pleadings or court papers were alleged to be. Deborah Alessi was not called as a witness. Professor Dershowitz, the defendant's lead lawyer on appeal, asked in the defense's opening brief, that the Government identify in its brief, the pleadings or court papers the grand jury was referring to in Count 7. In the Government's brief, it declined to answer. In the defense's reply brief, Professor Dershowitz asked the Government to identify the documents during oral argument. At oral argument, the Government persisted in its refusal to do so; a fact pointed out by Professor Dershowitz on rebuttal. The Seventh Circuit affirmed the conviction on Count 7, but did not address the question of the identity of which pleadings and/or court papers Count 7 was referring to.

Count 1: This was the conspiracy count to defraud the United States under 18 USC 371. The "fraud" did not include injury to any pecuniary or property interest of the United States. Rather, it was allegedly an interference with federal law enforcement. On September 13, 1994, the new omnibus crime-bill took effect. One of the provisions of that legislation was an amendment to 18 USC 1503, which expanded the specific acts which could be charged under that statute, and which increased the maximum sentence from 5 years and a $5,000 fine, to 10 years and a $250,000 fine. It must be emphasized however, that acts in violation of 18 USC 1503 committed prior to September 13, 1994, could only be punished by a maximum sentence of 60 months imprisonment and a fine of $5,000.

The defendant was found guilty of Count 1, Conspiracy to Defraud the United States, 18 USC 371, the maximum penalty for which was 5 years and a $5,000 fine; he was also found guilty of Count 2, Count 6, and Count 7, each one of which had been charged as a violation of 18 USC 1503, Obstruction of Justice. On September 19, 1997, Judge Limbaugh imposed the following sentence: Count 1, 60 months and a $5,000 fine; Count 2, 87 months and an $80,000 fine; Count 6, 87 months and an $80,000 fine; Count 7, 87 months and an $80,000 fine. All sentences to run concurrently. See Exhibit 1.

In Count 2, the defendant was charged with obstruction of justice by filing false pleadings in the civil injunction case: *Venezia v. Robinson,* 92-CV 867. The last act charged in Count 2, was the defendant's filing a Petition for Writ of Certiorari in the Supreme Court on May 17, 1994. The other acts charged were filing a brief in the Seventh Circuit in March 1994, and filing plead-

ings in the court of District Judge Stiehl in 1992 or 1993. Consequently there is not a shred of doubt that all of the acts that the defendant committed as charged in Count 2, were before September 13, 1994. Nevertheless, Judge Limbaugh sentenced the defendant to a term of imprisonment that was 27 months longer, and a fine that was $75,000 greater, than the maximum which Congress had provided for under 18 USC 1503. Apparently, based on Judge Limbaugh's comments at sentencing, the Judge thought the defendant deserved the extra punishment, because the defendant had treated the First Amendment with license. Judge Limbaugh imposed a prison sentence of an extra 27 months, as well as an extra fine of $75,000, apparently because the Judge did not like the way the defendant expressed his opinion in his newspaper. (See also Point 3.)

Under Count 6, the charge was that the defendant had obstructed justice "by engaging in acts to persuade" State's Attorney Haida to indict Bonds Robinson. The evidence at trial was that those "acts to persuade" Haida were: 1) The defendant trying to orally convince Haida in July 1993, that Robinson had perjured himself during the *People v. Vogt* hearings, which had taken place also in July 1993; 2) The defendant writing a letter to Haida on January 21, 1994; and 3) The defendant writing a letter to Haida on June 15, 1994. Once again, there is not a shred of doubt, that all of the acts which constituted the crime under Count 6, were committed before September 13, 1994. Once again, Judge Limbaugh's sentence was 27 months of imprisonment and $75,000 in fines over the maximum allowed by the statute.

As the defense has pointed out, no one outside the prosecutor's office is sure which are the false pleadings and court papers that the grand jury was referring to

when it charged Count 7. (Perhaps the prosecutor's office doesn't even know; the Government refused to tell the defense, or the trial judge, or the panel on the Court of Appeals. And the Seventh Circuit never addressed the issue.) The only such documents the defense is aware of, are pleadings drafted by the defendant for Venezia to disqualify Judge Stiehl in *Venezia v. Robinson*. However this Motion to Disqualify Judge Stiehl was never filed. The defense thinks that the theory of the grand jury, was that lawyer Deborah Alessi used the defendant's draft-motion as a "model" (that's the term the Government recited during trial). Thus the charge in Count 7 that the defendant "prepared" false pleadings and court papers. Deborah Alessi was never called as a witness.

But it must be noted that in any event, Deborah Alessi was not permitted to file her Motion to Disqualify Judge Stiehl, because Judge Stiehl refused to allow her to do so. (See Exhibit 14; Judge Stiehl rejected the motion to disqualify him, telling Alessi: "Court advises counsel it has issued an Order stating that no further motions may be filed without first obtaining leave of Court. Court advises Ms. Alessi the motions she attempted to file late yesterday would be returned to her in light of this Order.") Also, the evidence was that the only "false" statement in the Alessi pleadings, was Erin Griffin's averment that she had read the affidavit before she signed it, when in fact she had not.

Therefore once again, there is no doubt that the defendant's act of "preparing" the pleadings or court papers referred to in Count 7, took place in 1992 or 1993, well before the September 13, 1994 amendments to 18 USC-1503. The trial judge's sentence on this count was 27 months longer and $75,000 higher than the maximum allowed by law.

Chapter 28, section 2255, provides relief if the sentence "was in excess of the maximum authorized by law", and/or if "the court was without jurisdiction to impose such sentence" as was imposed against the defendant. In the case at bar, Judge Limbaugh was without the jurisdiction, that is he did not lawfully have the power, to sentence the defendant to a term of imprisonment longer than 60 months, or to a fine greater than $5,000, under either Count 2, or Count 6, or Count 7. Moreover, the excessive sentences under Counts 2, 6 and 7 were computed into the guideline calculations along with Count 1. Therefore, the defendant should be re-sentenced on all counts.

Irrespective of the fact that the defendant should be discharged, or in the alternative granted a new trial, in the alternative he should be re-sentenced to a lawful sentence.

POINT 6

YOUR MOVANT, AMIEL CUETO, HAS A GOOD-FAITH BELIEF THAT THERE ARE NUMEROUS OTHER *BRADY* VIOLATIONS, WHICH CAN BE BROUGHT TO THE COURT'S ATTENTION THROUGH DISCOVERY AND/OR AN EVIDENTIARY HEARING.

In the first four points of the defendant's 2255 motion, facts and arguments have been presented which entitle the defendant to a new trial, or to discharge. The fifth point shows that the defendant's sentence was imposed without jurisdiction and was excessive of the maximum fine and term of imprisonment allowed by law. However, the defendant believes that there are many other *Brady* claims which can be sustained through discovery and/or an evidentiary hearing; among which are:

A) There are numerous documents in the "private" correspondence between Mr. Grogan and the prosecutors, as well as other related documents in the administrator's files. Each one of these documents, in and of itself, is probable *Brady* material. If allowed to conduct discovery, these documents can be revealed.

B) Congressman Jerry Costello testified before the federal grand jury in April 1996, three months before the defendant was indicted. After his indictment and through his trial, the defendant was barred from talking to Congressman Costello as a condition of his bond, and the defendant did not talk to the Congressman during that time. Before trial and during trial, Congressman Costello's lawyer told the defendant's lawyers that the Congressman's grand-jury testimony was exculpatory of the defendant. However, on September 3, 1996, the Government pleaded the following:

> Footnote 2: "Parenthetically, Cueto uses his long time friendship with Congressman Costello as an example where the release conditions are unfairly restrictive, claiming that Costello's grand jury testimony will only be helpful to the defense. The Government is prepared to make an *in camera* submission of 3500 material to the Court to demonstrate that just the opposite is true."

Moreover, before trial and during trial, the prosecution asserted many times that Congressman Costello would be called as a Government witness to provide inculpatory evidence against the defendant. However, at the close of the Government's case, Congressman Costello had not been called. Nevertheless the Government assured the court and the defense that Congressman Costello would be called in rebuttal.

The defense was faced with the dilemma of whether the assertions of the Congressman's lawyers - that the grand jury testimony was exculpatory - were correct; or whether the pleadings and assertions of the Government - that Congressman Costello's testimony was inculpatory - were true. The Government had not disclosed the Costello grand-jury transcript as it was bound to do under *Brady v. Maryland*, if the testimony of the Congressman was exculpatory or impeaching. The defense finally decided to take the Government as its word. The defense could not risk calling Congressman Costello if his testimony were in fact inculpatory. If the Government's election not to call Congressman Costello in the case-in-chief were a trap, the damage would be fatal to the defense. The Government did not call the Congressman in rebuttal.

Now however, given the *Brady* violations the accused has discovered since his conviction and appeal, there should be little doubt that the Congressman's grand-jury testimony was indeed exculpatory, and probably impeaching of Government witnesses, including Robert Haida and Phil Montalvo. It seems apparent that the Government suppressed the transcript and falsely pleaded that the Costello testimony was inculpatory, in order to deceive the defense into not calling the Congressman.

The Government may deny this, however there is a simple test: If the defense can invoke the F.R.C.P. to subpoena documents, the defense can obtain production of the Costello-grand-jury transcript. The evidence therein will either be exculpatory or not. If it is, there is yet another *Brady* violation which requires a new trial.

C) At the time of the defendant's trial, Bill Richardson was U.S. Ambassador to the United Nations who was also a former member of the House of Representatives. He is presently Secretary of Energy. During the defendant's appearance before the grand jury in September, 1998 (the defendant had been brought back on writ, granted immunity, and compelled to testify), the prosecutor informed the defendant that Richardson had in fact been interviewed by the FBI in the investigation of the defendant before trial. (This comment will be in the transcript of the defendant's testimony.) There should be no doubt that Mr. Richardson's statements were exculpatory/impeaching. That conclusion is apparent because the Government never called Mr. Richardson at trial. If his statement would have been inculpatory, there is no question that the Government would have called him, because the Ambassador to the United Nations would have been a powerful, persuasive witness. Which is another reason why the Government would have suppressed his statement. Mr. Richardson as a defense witness would have destroyed the testimony of Government witnesses Montalvo and Bechtoldt.

Once again, if there is any doubt as to the exculpatory/impeaching nature of Mr. Richardson's statements, that doubt can be resolved by objective proof. If the defense can utilize the federal discovery rules, the defense can subpoena the statement and/or examine Mr. Richardson.

D) Numerous witnesses who testified before the grand jury – Larry Leventhal, Floyd Schlueter, and others – were alleged to be Government witnesses who would testify to inculpatory information at trial. But they were not called. The defendant was barred from talking to these people as a condition of his bond. Your movant

believes now that their statements were exculpatory. If so, the suppression of any such evidence was a *Brady* violation. The transcripts of these witnesses can resolve the question of whether their testimony was exculpatory or not.

E) The prosecutor at the defendant's trial later testified on behalf of Government-witnesses Tom Daley and Phil Montalvo at ARDC hearings. If this was part of the agreement the Government made with Daley and Montalvo to persuade them to testify against the defendant, then that fact was certainly impeaching and should have been disclosed.

The defendant believes that the record can be expanded, and that other points can be raised which require that a new trial be ordered. The defendant prays for leave to conduct discovery, and also for an evidentiary hearing.

CONCLUSION

Movant respectfully prays for relief pursuant to 28 USC 2255. The foregoing points and arguments have established at least three separate *Brady* violations: 1) The Grace-letter; 2) The Weissman memorandum; 3) The knowing introduction of perjured testimony. Any one of the *Brady* violations is in and of itself a requirement for a new trial or discharge of the defendant. Moreover, any perjurious testimony by Mr. Grogan raises a reasonable likelihood that the judgment of the jury could have been affected, which is the *Agurs* standard that requires a new trial. There is also a requirement for a new trial on any of the grounds of judicial bias and intervening change of law.

But after analysis of the individual Points raised herein, your movant prays that the court consider the totality of the circumstances in the case at bar. The defendant did not receive a fair trial. His guilt was not reliably determined which represents a fundamental miscarriage of justice. Respectfully, defendant prays that the court will vacate the judgment of conviction and sentence and discharge him; or in the alternative, grant him a new trial; or in the alternative, re-sentence him to a correct sentence (Point 5).

Respectfully submitted

/s/ Bruce N. Cook
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ATTORNEY FOR
DEFENDANT

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Belleville, Illinois 62220
(618) 235-3500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following attorney(s) of record by hand-delivering same to the office of W. Chuck Grace, U.S. Attorney for the Southern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois on the _____ day of October, 1999.

Respectfully submitted

/s/ Bruce N. Cook
BRUCE N. COOK, #00507660
ATTORNEY FOR
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U.S. Department of Justice

United States Attorney
Southern District of Illinois

Nine Executive Drive, Suite 300
Fairview Heights, Illinois 62208

May 2, 1995

Ms. Mary Robinson
Administrator
Attorney Registration
Disciplinary Commission
One Prudential Plaza
130 East Randolph Drive; Suite 1500
Chicago, IL 60601

Re: Attorney Amiel Cueto

Dear Ms. Robinson:

Please be advised that during the course of a year-long grand jury investigation into video gambling, racketeering, public corruption and tax violations, recently a cooperating witness for the government has submitted a proffer and subsequent testimony including allegations of attorney misconduct and criminal violations on the part of the above-referenced licensed attorney at law. This letter and enclosures are submitted to the commission pursuant to our ethical obligation.

Enclosed herewith is the Statement of Facts accompanying the plea of guilty of Mayor Sylvester Jackson, Mayor of Washington Park, Illinois, which is a matter of public record. The testimony given by Mayor Jackson was before the federal grand jury and is therefore confidential.

In addition, enclosed is a copy of the Seventh Circuit Court of Appeals opinion previously issued, which is pertinent to any inquiry as background and verification for one of the occurrences alleged in the Statement of Facts.

Also enclosed are copies of pertinent editions of the by- [sic] monthly newspaper, The *East Side Review,* which is published by a corporation established by Mr. Cueto and which has been published every two weeks since the Seventh Circuit Court of Appeals pronouncement. These copies contain statements believed to be written by Mr. Cueto, which pertain to the matter at hand.

Concerning any investigation, our office would prefer that any investigation you may begin be placed on hold after your responsive statement is received from the subject. In the event this is problematic, please do not hesitate to call either myself or the United States Attorney Criminal Division Chief, Michael Carr to discuss this aspect.

Thank you.

Very truly yours,

/s/ W. Charles Grace
W. CHARLES GRACE
United States Attorney

WCG/car
Enclosures

APPENDIX H

BEST AVAILABLE COPY

AO 245B (Rev. 6/95) Sheet 1 - Judgment in a Criminal Case

United States District Court

FIL

97 SEP 19

Southern District of Illinois at East St. Louis

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EAST ST. LOUIS

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA
v.
Amiel Cueto

Case Number: 3:96CR30070-001

Ronald Jenkins, James Donovan
Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) 1, 2, 6, 7 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to defraud the United States	07/18/1996	1
18 U.S.C. § 1503	Obstruction of justice	07/18/1997	2,6,7

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The defendant has been found not guilty on count(s) 3, 4 and 8
- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 328-40-0280
Defendant's Date of Birth: 02/22/1949
Defendant's USM No.: 03757-025
Defendant's Residence Address:
#1 Raintree Woods
Belleville IL 62223
Defendant's Mailing Address:
#1 Raintree Woods
Belleville IL 62223

09/19/1997
Date of Imposition of Judgment

Signature of Judicial Officer

Stephen N. Limbaugh
U.S. District Judge
Name & Title of Judicial Officer

9/19/97
Date

DEFENDANT: Amiel Coste

CASE NUMBER: 3:96CR30070-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 87 month(s).

Sentence consists of 60 months as to Count 1 and 87 months on each of Counts 2, 6 and 7, to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district:

☒ at 12:00 a.m./p.m. on 10/01/1997.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Aamir Caste

CASE NUMBER: 3:96CR30070-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s).

Consisting of 2 years on each of Counts 1, 2, 6 and 7 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Amid Costa

CASE NUMBER: 3:96CR30070-001

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall provide the U.S. Probation Office with any and all requested financial information. Defendant to surrender passport.

DEFENDANT: Amid Costa

CASE NUMBER: 3:96CR30070-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 350.00	$ 80,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

Fine consists of $20,000.00 as to each of Counts 1, 2, 6 and 7.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals: $ _____ $ _____

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses

DEFENDANT: Amiel Coste

CASE NUMBER: 3:96CR30070-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation office shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant shall pay costs of incarceration as follows: Either $37,500.00 due within 30 days OR $500.00 per month payable every 10 months ($5,000.00 every 10 months).

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk, United States Court, P. O Box 249, 750 Missouri Avenue, East St. Louis, IL 62202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

APPENDIX I

Government's Response to Point 5 of Motion for Relief Under 28 U.S.C. 2255

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* * *

Point 5: The sentence imposed on Counts 2, 6 and 7 was allegedly in excess of the maximum allowed by law.

Cueto asserts that the applicable statutory range of punishment for his convictions in Counts 2, 6 and 7, for obstruction of justice under 18 U.S.C. § 1503 is five years rather than ten since the maximum sentence that could be imposed for violations prior to September 13, 1994 was five years. It is initially noted that this argument fails because of his procedural default is not raising this issue on direct appeal and not demonstrating cause for the procedural default as well as actual prejudice. *See United States v. Frady,* 456 U.S. 152, 170 (1982). The "cause and [20] prejudice" standard required Cueto to show not only that "some objective factor external to the defense" impeded his efforts to raise this issue as required by each relevant procedural rule. *Coleman v. Thompson,* 501 U.S. 722, 753 (1991), but also the error he alleges "worked to his actual and substantial disadvantage, infecting his entire trial with error," *Frady,* 456 U.S. at 170. Cueto has failed to make the required showing of cause for each of his procedural defaults in failing to raise this claim in the district court and for his failure to raise this claim on appeal. *See Campino v. United States,* 968 F.2d 187, 190 (2d Cir. 1992).

His claim further fails because the claim ignores the language of the counts of the indictment for which he

was convicted. Count 2 alleged obstruction of justice from January 1992 and continuing through "the present" which would have been the date of the Indictment, July 18, 1996. Moreover, counts 6 and 7 both alleged. "[i]n or about 1993 and continuing through the present," which again would be July 18, 1996. Cueto now assets that there was insufficient evidence to support the jury's verdict on the time period charged in each of the counts and, therefore, the trial court was obligated *sua sponte* to find that the obstruction of justice charged ended prior to September 13, 1994. Apart from the evidence belying such an assertion, such unpreserved alleged error is not cognizable in a § 2255 motion.

It is further noted that Cueto's sought after relief under this point would not change his total sentence since the United States Sentencing Commission Guidelines dictated his sentence to be eight-seven (87) months. U.S.S.G. § 5G1.2(d) provides that if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In short, in spite of **[21]** Cueto's procedurally defaulted claim which nevertheless lacks merit, if the claim had merit, he still would be serving the same total sentence.

To the extent that Cueto's claim in his § 2255 motion amounts to an insufficiency of evidence claim on the obstruction of justice counts, this claim was previously raised on direct appeal and put to rest by the Seventh Circuit.

> We now turn to Cueto's argument that his convictions on the obstruction of justice counts were not

> supported by sufficient evidence. Cueto's task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelming supports the jury's verdict.

United States v. Cueto, 151 F.3d 620, 632-633 (7th Cir. 1998).

In the absence of changed circumstances of fact or law, the court will not reconsider an issue in a § 2255 proceeding which has already been decided on direct appeal. *Davis v. United States,* 417 U.S. 333, 342 (1974); *Taylor v. United States,* 798 F.2d 271, 273 (7th Cir. 1986), *cert. denied,* 479 U.S. 1056 (1987); *United States v. Mazak,* 789 F.2d 580, 581 (7th Cir. 1986).

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRIMINAL NO. 96-300-70 WDS

Title 18,
United States Code,
Sections 371, 1503, 1623, 2 and 3551, *et seq.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AMIEL CUETO, THOMAS VENEZIA,
and ROBERT ROMANIK,
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

CONSPIRACY TO DEFRAUD THE UNITED STATES 18 USC § 371

INTRODUCTION

At all times relevant to the Indictment:

1. There were in force and effect criminal statutes of the State of Illinois involving illegal gambling, including Illinois Revised Statutes, 720 ILCS 5/28-1 et. seq., formerly Ch. 38 §28-1 (Ill. Rev. Stat.), that made it a crime to use or agree to use video poker and video slot machines to track customer winnings and compensate or "payout" such winnings to customers.

2. There was in force and effect a federal statute, Title 18, United States Code, Section 1955, that made it a crime to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business involving video gambling machines in violation of the gambling laws of the state in which the gambling

* * *

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hearing under false pretenses when in truth and in fact, the State's Attorney never knew of or approved CUETO's plan to lure Robinson under false pretenses to the courthouse on September 1, 1992.

31. During the conspiracy, the United States Court of Appeals for the Seventh Circuit rejected CUETO's appeal and referred the state court judge for disciplinary proceedings and affirmed that CUETO had engaged in legal irregularities.

32. It was further part of the conspiracy that CUETO, on behalf of VENEZIA, would and did appeal the appellate court's decision to the United States Supreme Court and file a false pleading realleging the phony Haida story and which pleading attacked the integrity of the judges on the Court of Appeals claiming, among other things, that the federal appellate court judges had "vilified" VENEZIA. The Supreme Court refused the appeal.

33. It was a further part of the conspiracy that CUETO, VENEZIA, ROMANIK and others would and did engage in a series of acts to attack and discredit Agent Robinson in an effort to prevent him from participating in the continuing federal criminal investigation

of VENEZIA and B&H, including but not limited to the following:

a) in or about October 1992, CUETO would and did instruct ROMANIK and VENEZIA to make an unannounced visit to a B&H customer who had been arrested by local law enforcement and confessed in a written statement to charges of gambling. ROMANIK

* * *

[17]

Agent Robinson had demanded money from the witness when in truth and in fact CUETO's law partner was never told this by the witness.

40. It was a further part or the conspiracy that CUETO would and did deliver a transcript of the Vogt hearing to State's Attorney Haida with the demand that Haida charge Agent Robinson with the crime of perjury for denying at the Vogt hearing that Robinson had received money from the witness.

41. It was a further part of the conspiracy that on January 21, 1994 and June 15, 1994, CUETO would and did send letters to pressure Haida to criminally prosecute Robinson for a crime that Robinson did not commit.

42. It was a further part of the conspiracy that on January 10, 1995, Cueto would and did announce his intention to oppose Haida in election for the office of St. Clair County State's Attorney after Haida refused to prosecute Robinson for a crime that Robinson did not commit.

43. It was further a part of the conspiracy that in January 1995 CUETO caused to be published through

the Century Printing Company, a newspaper tabloid known as the East Side Review which he then caused to be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did threaten by intimidation in the East Side Review that he would prosecute Robinson if CUETO won the election for State's Attorney.

44. It was a further part of the conspiracy, that at or about the time that VENEZIA was indicted in the racketeering case in March 1995, in an effort to guarantee CUETO's electoral victory

* * *

[23]

h) In or about December 1994, VENEZIA replaced the gambling machines seized by FBI agents on the advice of CUETO, including at the Club Exposed niteclub;

i) In or about January 1995, VENEZIA made a $5,000 cash payment to CUETO;

j) In or about February 1995, VENEZIA made a $5,000 cash payment to CUETO;

k) In or about March 1995, VENEZIA made a $5,000 cash payment to CUETO;

l) On February 22, 1995, ROMANIK testified before the federal grand jury and denied recollection or knowledge in response to approximately 150 questions;

m) In or about January 1995, CUETO publicly threatened by intimidation in his tabloid, the East Side Review, to prosecute Robinson if he was elected states attorney;

n) In or between January 1995 and January 1996, CUETO'S company, the 1967 Corporation, would and did pay $215,000 to Century printing for publication of the East Side Review.

o) In or about April 1995, a meeting was set up with State's Attorney Haida to persuade him to vacate his office and create a vacancy for Cueto;

p) In or about July 1995 CUETO prepared and filed a false pleading on behalf of another in the racketeering case;

q) On or about July 19, 1995, Milan Venezia's attorney received a fax from B&H with purported instructions from Milan to his attorney to file certain pleadings in the racketeering case, however, the fax was false in that Milan was already cooperating with the federal government in the racketeering case and never issued those instructions to his lawyer;

r) On or about July 19, 1995, the same pleadings were delivered to Sandra Nations Venezia's defense attorney who refused to file false pleadings;

s) On or about July 19, 1995, Sandra's defense attorney met with defendant TOM VENEZIA and others **[24]** at which meeting TOM VENEZIA ordered Sandra's lawyer to file the pleadings;

t) Sandra's lawyer refused to file the pleadings and in response, TOM VENEZIA telephoned CUETO to report the refusal to file pleadings which Sandra had identified as having been CUETO's idea;

u) CUETO thereupon faxed a portion of the Illinois Rules of Professional Responsibility to TOM

VENEZIA's office with portions underlined in an attempt to coerce Sandra's attorney to file the pleadings;

v) On or about July 20, 1995, CUETO caused a draft letter to be faxed for Sandra Venezia to fire her defense lawyer in the racketeering case;

w) CUETO advised TOM VENEZIA to divorce Sandra Nations Venezia and marry Erin Griffin in a sham marriage to prevent Griffin from testifying against TOM VENEZIA at a subsequent trial.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

63. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

64. In or about and between January 1992 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in *Venezia v. Robinson*, cause no. 92-CV- **[25]** 867 in the United States District Court for the Southern District of Illi-

nois, on appeal in cause no. 93-2448 in the Seventh Circuit Court of Appeals, and on appeal in cause no.93-1929 to the United States Supreme Court by filing or causing to be filed false pleadings in connection with those proceedings.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 3
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

65. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

66. In or about and between January 1992 and continuing through early 1995, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendants

AMIEL CUETO
and
THOMAS VENEZIA

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1994-1 federal grand jury in the Southern District of Illinois by instructing Melvin Swanson that it was unnecessary for Swanson to appear in response to a grand jury subpoena and testify in the ongoing grand jury investigation of the B&H gambling racketeering case, by offering to "take care of it" for Swanson, by counselling him to assert his Fifth Amendment

* * *

[28]

73. In or about 1993 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendant

AMIEL CUETO

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due administration of justice in the 1994-1 federal grand jury in the Southern District of Illinois and in the racketeering case, *United States v. B&H Vending/Ace Music Corp., et al.*, cause no. 95-30024 in the United States District Court for the Southern District of Illinois by CUETO engaging in acts to persuade the St. Clair County State's Attorney to indict Agent Robinson, including by offering and causing to be offered a judicial position as a political favor to Haida to permit CUETO to fill the vacancy and indict Robinson.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 7
OBSTRUCTION OF JUSTICE
18 USC §§ 1503 and 2

74. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

75. In or about 1993 and continuing through the present, both dates being approximate and inclusive in St. Clair County in the Southern District of Illinois and elsewhere, the defendant

AMIEL CUETO

together with others known and unknown to the grand jury did corruptly endeavor to influence, obstruct and impede the due [29] administration of justice in the racketeering case, *United States v. B&H Vending/Ace Music Corp., et al.*, cause no. 95-30024 in the United States District Court for the Southern District of Illinois by preparing and filing and causing to be prepared and filed false pleadings and court papers in the federal district court.

All in violation of Title 18, United States Code, Sections 1503 and 2.

COUNT 8

CONSPIRACY TO OBSTRUCT JUSTICE
18 USC § 371

INTRODUCTION

76. Paragraphs 1-62 of count one of the indictment are incorporated by reference as though fully set forth herein.

77. It was within the authority of the 1995-1 federal grand jury, duly empaneled in the Southern District of Illinois, to investigate and return criminal indictments for, among other crimes, violations of the federal obstruction and perjury statutes.

78. It was within the authority of the 1995-1 grand jury to investigate conduct engaged in by the defendants and their coconspirators aimed at defrauding the government by impairing, impeding and obstructing lawful governmental functions and any attempt to do so in connection with the investigation and prosecution of the racketeering case.

79. Subsequent to the convictions in the racketeering case, the 1995-1 federal grand jury commenced such an investigation and issued or caused to be issued grand jury subpoenas for testimony and documents for at least that purpose.

* * *

APPENDIX K

* * *

[28-162]

think have been referred to as fact witnesses, there is a few other items here, but it is our intention at this point, you know, to finish, to rest.

And you want to publish this to the jury and — I don't know what you want to do. I just want you to know.

THE COURT: Well, I am prepared to rule. I think I can do it from notes that I have made with respect to all of the outstanding motions.

I can either do that, or if there is any one that you think that I might rule on that would govern your position, and if I ruled on that, depending on how I ruled, you could go ahead, or stop —

MR. JENKINS: Judge, the one in particular —

THE COURT: You are talking about the three fact witnesses?

MR. JENKINS: Yes, it's —

THE COURT: Yes, I know what you are talking about.

I am prepared to rule on that.

MR. JENKINS: Barney Mueller. True name.

THE COURT: It's Barney Mueller, Vaughn Karras and Don Dulle.

MR. JENKINS: That's correct.

[28-163]

THE COURT: I am going to sustain the motion to exclude the testimony of those three witnesses.

The proffered testimony is a part of a document stated "Defendants Status Report for the Court," for May 30th, 1997 and the week of June 2nd through the 5th.

It was received stamped by the clerk May 28th, 1997.

And on the basis of the proffered testimony, and the objections and my analysis of the materials submitted, the reason I am excluding this testimony is that, first of all, it's hearsay.

Some of it is double hearsay.

Portions of it, particularly Mr. Karras, involves the impeaching of a witness who has not testified.

And I have given my reasons for that in the Bonds Robinson motion.

And there is no showing that there was any knowledge by the defendant of these incidents to show his state of mind, at least in the evidence that was submitted to me in the material received May the 28th.

So I think it all should be excluded.

[28-164]

I am going to do so for the reasons that I have just set out.

MR. JENKINS: Judge, for purposes of the record, we would like — we will get this packaged together to put as a part of the court file.

I am sorry, sir, we did file it, and it's a part of the court file.

THE COURT: It's a part of the file.

MR. JENKINS: Okay.

THE COURT: Everything is in there, I assume. And that's, going over those statements, was the basis of my comment. But they are a part of the record.

MR. JENKINS: Okay.

THE COURT: Hold on. Didn't I — I just got a copy of it, didn't I? I have original shown as leave to file granted.

MR. DONOVAN: Judge, I don't know if they are attached to the clerk's copy.

I think I had some reluctance of putting the statements in the file.

I don't know.

MS. MIQUELON: Do you want to put them under seal?

MR. DONOVAN: It would probably be better.

* * *

APPENDIX L

[26-59]

Cueto - Direct

Q. What did he indicate to you?

A. He said "Come on over." And I did.

I walked across the street and went right to his office first.

Q. Did have you anything with you?

A. I had that letter, the August 28th letter.

It's Exhibit 10, dated August 28th, written directly to him.

That's the only document I had at the time when I first went up to his office.

Q. That's the only paperwork you had when you went to Bob's office?

A. Yes.

Q. Did you discuss the contents — or did you have a discussion with Bob Haida?

A. Yes, we met in his office.

And I handed him the letter. I let him read it.

And then we discussed it.

Q. Can you tell the jury your best memory of your discussion with Bob Haida on that date?

MS. MIQUELON: Objection, your Honor. Hearsay.

THE COURT: Well, he can certainly testify as to what he said.

So the objection will be overruled as to that **[26-60]** portion of the conversation.

MR. DONOVAN: Your Honor, it is not being offered for the truth of the matter.

THE COURT: Just a minute. Let's have a bench conference.

Members of the jury, let's take a brief recess for just a few months [sic] moments.

(Bench conference, on the record, all attorneys:)

THE COURT: All right.

MR. DONOVAN: Your Honor, two things.

It's not being offered for the truth of the matter asserted, what Mr. Haida said, but to show ultimately why the defendant took actions later in this case that he is charged with.

I think the defense has the right to show clearly to the jury why he acted in a certain way.

The limiting instruction can be given.

His statements will also impeach things that Mr. Haida said.

His memory of what occurred in the conversation is different than Mr. Haida's, and it will impeach Mr. Haida, and it will go to Mr. Haida's credibility.

The most important thing is: The Government is allowed to do, in every criminal case, they are able **[26-61]** to have statements of third parties come in, actions

that happened outside the court, why a policeman acted in a certain way, why an investigator did something, so the jury understand, and the jury knows.

The jury can be given a limiting instruction that it is not being offered for the truth of the matter asserted.

To not allow this denies the defendant of putting any background, any context, any basis for his actions.

And I think it not hearsay for those reasons.

MS. MIQUELON: First of all, your Honor, it is clearly being admitted for the truth of the matter asserted.

And in fact counsel just said, "We are introducing it to impeach Bob Haida," who has already said that what Amiel Cueto said he said is a lie.

And so now what they are trying to do is to bring the conversation in to prove that Mr. Haida is a liar.

Mr. Haida is not on trial in this case. His credibility is not at issue, certainly with respect to the defendant's testimony.

Additionally, your Honor, and not only in **[26-62]** addition is it being introduced for the truth of the matter asserted, this does not go to the defendant's state of mind at the time, your Honor.

And the importance of that is that this story about Bob Haida, from the defendant, never surfaces in any document until 1994.

So there is nothing contemporaneous, your Honor, to prove that at the time this statement occurred.

There is no evidence in this case. There is no foundation for this.

And, in fact, a witness has testified that this conversation did not occur in this way.

And this is clearly hearsay.

It is being offered for the truth of the matter asserted. As counsel has admitted, it's being used to impeach Bob Haida, which is totally improper under the rules of evidence

And, additionally, this isn't a situation where Government was allowed to introduce third-party statements to show somebody's state of mind.

Your Honor, was introduced for the sole purpose of showing that the defendant had in fact falsely stated matters in a pleading that was filed before the United States Supreme Court.

So, this is not — Mr. — his claim regarding **[26-63]** what Mr. Haida said is clearly hearsay, and it's not admissible under any rule of evidence.

THE COURT: All right.

I am going to sustain the objection as to what Mr. Haida may have said.

He can certainly testify as to what the defendant said to him.

And then you can ask him questions about what he may have done after the conversation.

But I don't think you have the right to impeach a witness by hearsay testimony, because if you are im-

peaching him, why, you are introducing it for the truthfulness of it.

MR. DONOVAN: And, Judge, you are also denying it to show, not as hearsay, but to show why he acted in a certain fashion for that limited purpose?

THE COURT: No. I don't think you can do that.

I don't think you can wholesale hearsay testimony from this and any other witnesses that you indicated earlier we are going to be involved with concerning his testimony.

When you are getting hearsay evidence in, and it's being introduced not for the truthfulness of it,

* * *

[26-73]

A. Romanik came back and said that Bonds Robinson was in fact in the courtroom.

Q. After Bob Romanik told you that, what occurred?

A. The four of us, that is Romanik, Venezia, Daley and I, walked across the street to the courthouse to Courtroom 1. It's on the first floor.

Q. What did Bob Romanik do at that time?

A. We walked into the courtroom.

Venezia and Daley remained outside in the hall.

Sylvester Jackson was nowhere in sight.

Romanik and I went into the courtroom, and Romanik served him with a subpoena that was styles "Venezia vs. Robinson."

And it had the case number, 92-CH-299, which is the case number of this petition.

Q. Was Mr. Robinson given a copy of the petition by Mr. Romanik?

A. He might have been at that time.

But I think I formally handed it to him during hearing.

Q. What occurred at that point?

A. Robinson addressed me, and he said, "What's this?"

And I said "It's a petition for a TRO, preliminary injunction and permanent injunction."

[26-74]

And then he said —

MS. MIQUELON: Objection your Honor. Hearsay as to Mr. Robinson.

THE COURT: Be sustained.

BY MR. DONOVAN:

Q. Could you tell us, after you spoke to Mr. Robinson, can you tell us what occurred next?

A. Yeah.

The four of us, Venezia, Daley, Romanik and I, walked down the long hallway from Courtroom 1 towards the foyer area of the courthouse where the elevators are.

And as we rounded the corner, you make a left turn to go to the elevators, I turned and looked down the hall,

and saw Mr. Robinson come out of the courtroom very quickly, and go to the pay phones that were on the wall.

Q. Did you — what did you observe Mr. Robinson do at the pay phone?

A. Pick up the receiver and apparently dial a number.

Q. What courtroom was the injunctions scheduled to heard in?

A. 407.

Q. And what type of courtroom is that?

* * *

[26-79]

A. The 12th question that I asked him was who —

MS. MIQUELON: Objection, your Honor. Side bar.

THE COURT: Sustained.

MR. DONOVAN: Your Honor, could I approach the bench to make a record?

THE COURT: All right.

Bench on.

(Bench conference, on the record, all attorneys:)

THE COURT: All right.

I have previously excluded the transcript of the Robinson hearing, and I am going to continue to do so.

And I don't think that we can piecemeal portions of the interrogation of the witness, in view of that prior ruling, which I still maintain.

MR. DONOVAN: The defendant's position is that the Court — the Court's position up, to this point, when he takes the stand — I understand your ruling.

At this point, I am not offering for the truth of the matter asserted Mr. Robinson's comments in that courtroom, or testimony.

I'm offering this to show why the defendant **[26-80]** acted in a certain way at some time in the future, and why his actions were reasonable.

I'd like to put into the record three Seventh Circuit cases.

I am not representing to the Court that these were defendants that were testifying at the time.

These were police officers who were allowed to testify to statements outside of court to show why they acted in a certain fashion.

And that if the Court chose at that time a limiting instruction, it was — okay.

But by doing this, the Court takes away, it does not allow Mr. Cueto to say why he acted, does allow him to give the underlying the reasons, and really guts his attempt to explain his defense.

This is not hearsay, because I am just not offering it for the truth.

THE COURT: I am sorry. I think to allow piecemeal portions of the testimony, even under the theory

that you're suggesting, violates the Seventh Circuit order in this matter.

So you can make an offer of proof.

But I am denying your request to ask about certain portions of the testimony in the case.

MR. DONOVAN: Judge, if I move the entire [26-81] transcript in, would your ruling change?

I mean, because if it is, I will move the whole transcript in.

THE COURT: No.

I am going to deny your request.

MR. DONOVAN: At a break, can I read these cases?

I don't wish to take your time and the jury's now

THE COURT: Certainly.

(In the hearing and presence of the jury:)

BY MR. DONOVAN:

Q. Just to go back a second.

Bonds Robinson did appear in the courtroom?

A. Yes.

Q. He was called as a witness?

A. Yes.

Q. Did he give testimony, without going into the content of his testimony?

A. Yes.

Q. Did you question him?

A. Yes.

Q. To your understanding, did Judge Radcliffe enter an order based on Bonds Robinson's testimony, and the other witnesses that day?

[26-82]

MS. MIQUELON: Objection, your Honor, as to the basis.

THE COURT: All right. Be sustained.

BY MR. DONOVAN:

Q. Was — without going into Bonds Robinson's answers, can you tell the jury what you questioned him with regards to?

MS. MIQUELON: Objection, your Honor.

THE COURT: Sustained.

BY MR. DONOVAN:

Q. Were there others witnesses that testified on September 1st of 1992?

A. Yes.

Q. And could you tell us the names of those witnesses?

A. Mel Swanson and Tom Venezia.

Q. Did you speak with either of those witnesses with regards to their testimony prior to taking the witness stand?

A. No.

Q. Was Judge Radcliffe provided a copy of Defendant's Exhibit A-2, I believe?

A. Defendants's Exhibit A-2, yes, before the hearing. It was in the file.

Q. And was Judge Radcliffe given a copy of these

* * *

[26-85]

I was standing in the hall outside the courtroom when he came up.

Q. Did you have a conversation with him on that day?

A. Yes, I did.

Q. Can you tell us the nature of your conversation with Mr. Haida on that day?

MS. MIQUELON: I am going to object, your Honor.

MR. DONOVAN: I understand, Judge. But I just —

THE COURT: He can certainly testify as to what he said; that is, what the defendant said.

But I will sustain it as to what Mr. Haida said.

BY MR. DONOVAN:

Q. Without going into anything that Bob Haida said —

MS. MIQUELON: Your Honor, I am going to object on another basis.

I would like a foundation for this conversation.

THE COURT: I don't understand the nature of the objection.

MS. MIQUELON: Your Honor, who was present, where the conversation occurred.

THE COURT: Oh, all right.

* * *

[26-87]

Q. Did you have any other questions of him, that you remember?

A. Yeah. And they all concerned the telephone call.

Q. Was there a News Democrat article in the paper after this hearing, the next day, September 2nd?

A. Appeared September the 2nd, 1992.

Q. Without going into the content of the article, did it describe what occurred in the hearing?

A. Yes.

Q. After that newspaper article came out, did you receive a telephone call from Tony Joynt?

A. Yes. That morning.

Q. The morning of September —

A. September the 2nd, 1992. It was a Wednesday.

Q. Where did you receive the phone call?

A. At my office.

Q. And can you tell us what your conversation was with Tony Joynt?

MS. MIQUELON: Your Honor, could we have a side bar?

THE COURT: All right.

(Bench conference, on the record, all attorneys:)

MS. MIQUELON: Your Honor, Mr. Donovan [26-88] knows what the Court's ruling is on these conversations

He is purposely doing this, so that every time he asks about a conversation, the Government is going to have to get up in front of the jury and object, and it looks like the Government is not letting him get this out from his client.

This is totally improper, your Honor. He know [sic] what the rulings are, and he keeps doing it.

MR. DONOVAN: Judge, this is absolutely wrong.

And now we're to a totally different thing than anything we talked about this in case.

THE COURT: I certainly will allow you to inquire about having a conversation with Tony Joynt.

But I am going to sustain objections as to the content of the conversation.

MR. DONOVAN: I am not offering it for the truth —

THE COURT: I know you are not.

MR. DONOVAN: Do you remember the Vogt hearing, where you said that because he represented to Judge Goodwin that Tony Joynt told him about this, that you would not let in the Daley conversation with Linda Joynt.

[26-89]

These people aren't available to us. They have taken the Fifth Amendment. The Government won't give them immunity.

THE COURT: I know.

The fact they have taken the Fifth doesn't entitle you to circumvent the rule.

MR. DONOVAN: I would ask you to give the jury a limiting instruction.

Tell them that this is not being offered for the truth, it is being offered to show why this man took action that he is charged with.

MS. MIQUELON: First of all, your Honor —

THE COURT: I understand that that is your position, but I am denying it. And I am not going to let you go into that.

We might as well — I am in the process of preparing an order now with respect to these exhibits.

I am going to exclude the exhibits concerning the Joynt hearing as well

MS. MIQUELON: The Vogt hearing, Judge.

THE COURT: The Vogt hearing, I mean.

MR. DONOVAN: Judge, I understand your ruling. I will comply with it.

In her cross, I would only ask that she be held [26-90] to these kind of limitations.

THE COURT: Certainly I am not going to let her go into anything that you have been precluded from.

And I wouldn't imagine she would get into it any way.

MS. MIQUELON: And we are certainly not going to ask him about the Tony Joynt conversation —

MR. DONOVAN: Thank you.

MS. MIQUELON: You are welcome.

(In the hearing and presence of the jury:)

BY MR. DONOVAN:

Q. Who is Tony Joynt?

A. Tony Joynt is one of the owners of the Illinois Distributing Company.

It is the distributor, the wholesale distributor, of Anheuser Busch products in parts of St. Clair and Madison County.

It is — the business is located right outside of Belleville, right off of 460.

And they distribute Anheuser Busch products to the retail outlets. And they have an Illinois state liquor license.

Q. He initiated this phone call to you?

A. Yes. I have known him for many years.

* * *

[26 - 92]

office.

Q. Was that conversation in connection with Tony or Linda Joynt?

A. Yes.

Without telling the jury what Tom Daley said, can you tell us what questions you asked him in connection with Linda Joynt?

A. I don't know if it was in the form of a question.

I remarked that he had received a telephone call from Linda the same time that I received the call from Tony.

Q. Did Daley's conversation with Linda Joynt — was it connected to Bonds Robinson?

A. Yes. The very same article that came out that morning.

Q. In approximately that same point of time, September or the fall of 1992, were there any rumors that you were aware of circulating in St. Clair County that had been initiated by Bonds Robinson?

MS. MIQUELON: Objection, your Honor.

THE COURT: All right. Sustained.

BY MR. DONOVAN:

Q. What occurred on October the 19th of 1992?

And in connection with that, let me hand you

* * *

APPENDIX M

* * *

[32-67]

furtherance of the conspiracy, they may not be considered by you as evidence against the member who did — or they may be considered by you as evidence only against the member who did or said them.

Now, the following instruction is applicable to Counts 2 through 8 of the indictment:

The law prohibiting the obstruction of justice, under Section 1503, is designed to prevent a miscarriage of justice resulting from corrupt methods.

It is aimed at a variety the means by which the orderly and due process of the administration of justice may be impeded, thwarted, or corrupted.

The due administration of justice refers to the fair, impartial, uncorrupted and unimpeded investigation, prosecution, disposition, or trial of any matter, civil or criminal, in the courts of the United States.

It includes every step in a matter or proceeding in the federal courts to assure the just consideration and determination of the rights of the parties, whether Government or individual.

Thus, due administration of justice includes, but is not limited to, a grand jury proceeding, or a federal, civil or criminal trial, or an investigation [32-68] undertaken with the intention of presenting evidence before a grand jury for a pending grand jury investigation.

The sweep of the statute extends to any corrupt endeavor or effort to interfere with a grand juror's, or

federal judge, magistrate, or officer's function in the discharge of their duties.

The key word in the statute is endeavor.

As used in this statute, endeavor means any effort or any act, however contrived, to obstruct, impede, or interfere with the grand jury or trial proceedings.

And it is the endeavor which is the gist of the crime. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.

There is no requirement that any sort of money be offered or received before the endeavor can be considered corrupt.

Corruptly means to act with the purpose of obstructing justice.

The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice.

[32-69]

The Government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice.

Intent may be inferred from all of the surrounding facts and circumstances.

Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.

The statute reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.

And means, though lawful in themselves, can cross the line of illegality, if employed with a corrupt motive to hinder the due administration of justice, so long as the means have the capacity to obstruct.

An attorney has an ethical duty to advance the interests of his client, and must take all reasonable lawful means to attain those interests.

Any person who knowingly aids, abets, counsels, commands induces, or procures the commission of a crime is guilty of that crime.

However, that person must knowingly associate

* * *

APPENDIX N

GOVERNMENT EXHIBIT 85-12

No. 93-1929

IN THE SUPREME COURT
OF THE UNITED STATES

Term: October, 1993

THOMAS VENEZIA,
Plaintiff-Petitioner.

v.

BONDS ROBINSON, JR.,
Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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* * *

[3]

The letter to State's Attorney Haida was hand-carried to him by Venezia's lawyer - Amiel Cueto. (R. 12, Exh. 2, pp. 46-47) Cueto delivered the letter to Haida at Haida's office on August 28, 1992, and Cueto and Haida discussed Robinson's bribe and extortion plot: they decided

that Haida would call Robinson to the courthouse on September 1, 1992, on the pretext of a hearing, so that Cueto could subpoena Robinson to testify in the chancery court on that day; and that was in fact was done. (R. 12, Exh. 2, p. 4) Robinson was served with both a subpoena and a Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent injunction. (R. 12, Exh. 2, p. 6) An evidentiary hearing was held, and at the conclusion the state court issued a preliminary injunction (R. 2)

* * *

[17]

Why would the court of appeals report this false statement about Tom Venezia?

The above statements by the Seventh Circuit Court about Tom Venezia are false, malicious (that is, published with knowledge that the statement were false), and defamatory. Why would the court say these outrageous things? One wonders whether there is something going on here other than the scholarly resolution of legal issues. Which leads to the argument on this point.

* * *

[21]

CONCLUSION

* * *

The State's Attorney and Venezia's lawyer together agreed on a plan to stop Robinson's extortion, and the State's Attorney called Robinson to the courthouse on a pretext. This was done on September 1, 1992, in order to set Robinson up for Venezia's preliminary injunction hearing.

* * *